MERCOSUR AT TWENTY: FROM ADOLESCENCE TO ADULTHOOD?

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I. INTRODUCTION

A decade ago, MERCOSUR, the Common Market of the Southern Cone, had, in a short time, achieved great progress in economic integration. It had agreed upon the gradual integration of internal tariffs and on a common external tariff covering approximately 85% of the items being traded by its members. It had reached agreement on a substantial number of trade matters and had adopted a large number of directives and resolutions seeking to harmonize the legal and regulatory systems of its member states.[1] Trade among its member states had expanded substantially.[2] It became the third largest trading block in the world, after the North American Free Trade Agreement (NAFTA) and the European Union.[3] Other countries in Latin America, attracted by its success, were seeking to develop closer ties.[4]

At that time, MERCOSUR had ambitious plans for the future, which included future institutional development (including plans for an appellate tribunal and a parliament); a free trade agreement with the European Union; and planned expansions of the integration process within its members.[5] In spite of potential competition from the U.S.-led Free Trade Area of the Americas, which sought to establish a hemisphere-wide free trade agreement,[6] the future looked bright.

From 2003 to 2004, this Author chronicled these events and predicted a great future for MERCOSUR, but noted that, to achieve its goals, it needed to deal with two major problems: its lack of supranational institutions and an effective dispute resolution mechanism.[7] Essentially, MERCOSUR and its institutions depended on the consensus of its member states, and its norms could not be implemented unless and until they had been ratified by the legislatures of all member states.[8] No independent and objective supranational institutions similar to the European

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1. Rafael A. Porrata-Doria, Jr., *MERCOSUR: The Common Market of the Twenty-First Century?*, 32 GA. J. INT'L & COMP. L. 1, 69 (2004).
2. *Id.*
3. *Id.* at 2.
4. *Id.* at 68.
5. *Id.* at 52–53.
6. *Id.* at 70.
7. Porrata-Doria, Jr., *supra* note 1, at 71.
8. *Id.* at 55.

Union's Commission existed to expand and implement its agenda or to facilitate member state consensus on the integration agenda.[9] Moreover, the Argentina-Brazil crises of 2000–2002 made clear that both these countries, in general, and their presidents, in particular, exercised an outsized and controlling influence on MERCOSUR.[10]

As this Author noted at the time, the lack of an effective dispute resolution mechanism also created major obstacles to the implementation and expansion of the MERCOSUR agenda and fostered a situation in which MERCOSUR members would conclude that there was no effective penalty for noncompliance with community norms.[11]

In 2012, more than twenty years after the signing of the Treaty of Asunción[12] and the Brasilia Protocol[13] and ten years after the signing of the Olivos Protocol,[14] MERCOSUR is facing a very different set of economic and political challenges. The economic situation of the original MERCOSUR member states[15] has changed drastically, especially after the economic crisis of 2008.[16] Since this Author's analysis in 2004, the Free Trade Area of the Americas has collapsed;[17] the MERCOSUR-European Union negotiations appear to be stalled; a MERCOSUR-European Union free trade agreement appears unlikely;[18] the asymmetries between

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9. *Id.* at 71; Andrés Malamud, *The Internal Agenda of MERCOSUR: Interdependence, Leadership and Institutionalization, in* LOS NUEVOS ENFOQUES DE LA INTEGRACIÓN: MÁS ALLÁ DEL REGIONALISMO 115, 125 (G. Jaramillo, ed., 2008), *available at* http://www.flacsoandes.org/web/imagesFTP/1215192326.The_internal_agenda_of_Mercosur_por_Andres_Malamud.pdf [hereinafter Malamud: *Internal Agenda*].

10. See *infra* notes 129–52 and accompanying text for the evolving role of Brazilian and Argentinian Presidents in the internal agenda of MERCOSUR.

11. Porrata-Doria, Jr., *supra* note 1, at 64.

12. Treaty Establishing a Common Market, Arg.-Braz.-Para.-Uru., Mar. 26, 1991, 30 I.L.M. 1041 [hereinafter Asunción].

13. Protocol of Brasilia for the Settlement of Disputes, Dec. 17, 1991, 36 I.L.M. 691.

14. Olivos Protocol for the Settlement of Disputes in MERCOSUR, Feb. 18, 2002, 42 I.L.M. 2 [hereinafter Olivos].

15. Venezuela is not considered in this analysis because Venezuela did not join MERCOSUR until July 31, 2012. See *infra* Section VIII for a detailed discussion of Venezuela's entrance and effect on MERCOSUR.

16. See *infra* Section III.A for a discussion of the 2008 financial crisis and its impact on the economies of MERCOSUR states.

17. *See* J.F. HORNBECK, CONG. RESEARCH SERV., RS20864, A FREE TRADE AREA FOR THE AMERICAS: MAJOR POLICY ISSUES AND STATUS OF NEGOTIATIONS 4–6 (Jan. 3, 2005), *available at* http://www.fas.org/sgp/crs/row/RS20864.pdf (describing the extended stall of FTAA negotiations and the international tensions motivating those stalls).

18. *See* Félix Peña, *El Dificil Arte De Concluir Lo Comenzado: La Experiencia de la Rueda Doha y de las negociaciones Mercosur-Unión Europea* [*The Difficult Art of Concluding What Was Started: The Experience of the Doha Round and the EU-Mercosur Negotiations*], NEWSLETTER SOBRE RELACIONES COMERCIALES INTERNACIONALES [INT'L TRADE RELATIONS NEWSLETTER] (Isabel Romero Carranza trans., Apr. 2011) *available at* http://www.felixpena.com.ar/index.php?contenido=negotiations&neagno=report/2011-04-experience-of-doha-round-and-eu-mercosur-negotiations (explaining that the negotiations between MERCOSUR and the European Union have halted, leaving the future of the deal uncertain).

MERCOSUR's smaller members, Paraguay and Uruguay, and its larger members, Argentina and Brazil, are expanding, and the former countries are complaining that they have not benefited as expected from MERCOSUR;[19] Paraguay has been suspended from MERCOSUR, and its future in the organization is uncertain;[20] the dispute resolution mechanism created by the Brasilia and Olivos Protocols, consisting of a Permanent Revision Tribunal with enhanced powers, does not seem to be functioning;[21] and Venezuela, in spite of the opposition of at least one member state, has been admitted as a full member, and seeks to completely change MERCOSUR's raison d'être.[22]

In order to better understand how these changes influence MERCOSUR's future, one first needs to understand the effect that these changed circumstances have had on MERCOSUR itself. Secondly, one also needs to re-examine the problems this Author described in 2004 to see if MERCOSUR has attempted to resolve them and, if so, whether these solutions have been effective. Thirdly, one needs to analyze the effect of Venezuela's full membership on MERCOSUR's current dynamic.

In order to do this, Part II of this Article will generally restate and update the analytical framework used to examine MERCOSUR in 2004. Part III will highlight recent economic trends in Argentina, Brazil, Paraguay, and Uruguay, the original MERCOSUR members, as well as the effects of the 2008 economic crisis and the emergence of China as a leading investor and trader in Latin America on the region. Part IV will examine and analyze the role of the presidents of Argentina and Brazil in setting and advancing the MERCOSUR agenda. Part V will explore the continuing asymmetries between the large MERCOSUR member states—Argentina and Brazil— and the smaller member states—Paraguay and Uruguay—and MERCOSUR's attempts to ameliorate them. Part VI will consider the Committee of Permanent Representatives (COREPER) and the MERCOSUR Parliament, MERCOSUR's recent attempts at institution building, and the effect of those attempts on the community. Part VII will evaluate the adequacy of the current MERCOSUR dispute resolution system. Part VIII will consider Venezuela's entry into MERCOSUR as a full member, and will analyze the effect of this addition on the institution's future. Lastly, this Article will compare and contrast MERCOSUR's current situation and prospects with that of 2004 and will consider its prospects for the future.

19. See *infra* Section V for a detailed discussion of the growing asymmetries and discontent amongst the large and small economies of MERCOSUR.

20. See *infra* Section V.B for a discussion of Paraguay's shifting status within MERCOSUR, culminating in Paraguay's suspension. See *infra* notes 260–62 and accompanying text for the details of Paraguay's suspension from MERCOSUR.

21. See *infra* Section VII for an analysis of MERCOSUR's dispute resolution structure and its current difficulties.

22. See *infra* Section VIII for the history of Venezuela's admittance to MERCOSUR and a discussion of how Venezuela is influencing MERCOSUR policies.

II. AN ANALYTICAL FRAMEWORK FOR INTERNATIONAL ECONOMIC ORGANIZATIONS

In order to assess the success or effectiveness of an international economic organization (IEO) such as MERCOSUR, this Author noted in 2004 the necessity of an analytical framework to understand why a nation would form part of—and remain in—an IEO like MERCOSUR instead of remaining an independent trader or entering into more ad hoc and temporary arrangements with other individual nations, groups of nations, or other IEOs.[23] This framework would then serve as the basis for the assessment of the effectiveness of the particular IEO—in this case—MERCOSUR. In engaging in this analysis, this Author relied on the analytical framework and theory constructed by Professor Joel Trachtman,[24] which will be restated below.[25]

One must first assume that individuals and states acting in the international arena generally act in their own self-interest,[26] and that these international interactions operate in the form of a market.[27] This market can, in fact, be described as a continuum, ranging from "spot market transactions" through many types of contracts and informal arrangements, to formal organizations such as IEOs.[28] The assets traded in this market are not merely goods or services but components of power.[29] These transactions can range from informal, occasional "spot" transactions between one or two individual states to more formalized, permanent agreements involving multiple interactions over a lengthy period of time.[30] States enter this market because they seek to obtain benefits (such as

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23. Porrata-Doria, Jr., *supra* note 1, at 40.

24. Joel P. Trachtman, *The Theory of the Firm and the Theory of International Economic Organization: Toward Comparative Institutional Analysis*, 17 NW. J. INT'L L. & BUS. 470 (1996–1997) [hereinafter *Theory of the Firm*].

25. This discussion was set forth in Porrata-Doria, Jr., *supra* note 1, at 40–43.

26. *Theory of the Firm*, *supra* note 24, at 482.

27. *See id.* at 487 (analogizing behavior in a market of goods to the behavior of nations in a "'market' of international relations").

28. Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law,* 24 YALE J. INT'L L. 1, 17–18 (1999).

29. *Theory of the Firm, supra* note 24, at 498. Under the Trachtman analysis, three types of goods may be traded between nations: private goods, domestic public goods, and international public goods. *Id.* at 90. Economists define public goods as those having two characteristics, non-exclusivity and non-rivalry. *Id.* Non-exclusivity describes goods where the cost of preventing their use by persons other than their owner is too great to be worthwhile. *Id.* Non-rivalry describes goods whose consumption by one person does not diminish their availability to others. *Id.* At the domestic level, these goods include infrastructure services, police services, national security services, and all manner of regulatory norms, including trade regulation. International public goods can include international law, regulation, or international organizations. *Id.* at 490–91. In the legal context, this power is more narrowly described as jurisdiction, including jurisdiction to prescribe, adjudicate, and enforce. *Id.* at 491. In international society, the equivalent of the market is simply the place where states interact to cooperate on particular issues to maximize their interests and preferences. *Id.* at 498.

30. *See id.* at 499–500 (explaining "spot transactions," more institutionalized transactions, and how they interact on the IEO market).

favorable trade terms) that they cannot obtain otherwise and enter into these exchanges to obtain gains therefrom. Indeed, states will "trade" in this market as long as their net gains from this trade exceed their related losses and transaction costs.[31] If these exchanges result in no gains, then there is no incentive to participate, and thus, no incentive for trade, cooperation, or integration.[32]

In this analysis, an IEO represents an attempt to "institutionalize" this "market" by negotiating and creating a "template" through which states can agree in advance to permit certain types of transactions, thereby minimizing the costs of negotiating and implementing individual trade transactions and maximizing their gains therefrom.[33] An implied precondition of this "institutionalization" is that there must already be some "market" (that is, some existing trade relationship) to "institutionalize."[34] In an IEO, states contract with each other to establish rules for the benefit of the private economic actors that engage in trading.[35] These rules significantly reduce the risk of arbitrary and unpredictable government action in trading and enable states participating in an IEO and trading actors to have some degree of regulatory predictability in trade. [36]

These entities exist in a competitive environment.[37] They compete against other IEOs, non-governmental organizations (NGOs), multinational firms, or states themselves.[38] The business firm prevails against its competition by earning more profits; IEOs compete for responsibility.[39] The more responsibility over transactions, economic sectors, areas of regulation, territory, and nation-states, the more fundraising and rulemaking authority IEOs will require to implement their responsibility adequately, and the more successful they will be.[40]

IEOs are vehicles of state collusion among states that "engage in a

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31. *See id.* at 553–54 (identifying and explaining this relationship with the formula [Net Gains from Trade]=[Trade Gains]-([Trade Losses]+[Transaction Costs]).

32. *Id.* at 496–99. The more institutionalized these arrangements become, the more the arrangements resemble the workings of a firm, rather than the workings of a market, especially when these arrangements have longer terms, cover more transactions, are more complex, or provide for decision-making in the future other than by unanimous consent. *Id.* The theory of the firm is thus useful and appropriate in analyzing the workings of an IEO. *Id.* at 499.

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34. *See id.* at 496–99 (framing this analysis around the market analogy of international state behavior).

35. Steve Charnovitz, *Triangulating the World Trade Organization*, 96 AM. J. INT'L L. 28, 42 (2002).

36. *Id.*

37. *Theory of the Firm*, *supra* note 24, at 519.

38. *Id.*

39. *Id.* at 513.

40. *Id.* at 519.

competition for the provision of public goods."[41] When they collude, states (1) make "spot" transactions for power (such as, for example, the admission of a new member to an IEO); (2) enter into longer-term agreements to transact in power in the future; or (3) form IEOs, whose future behaviors, actions, or policies they may not be able to predict.[42] Once states enter into an IEO and make the structural changes required to implement the IEO mandate, it is very hard for them to return to their prior state.[43]

The relationship between member states and an IEO is similar to that of a shareholder and his or her firm.[44] In order to further the purposes of the organization, the state delegates to the organization some of its rights to control some of its affairs; however, it generally retains the right to residual control over those affairs unassigned to the IEO.[45] This takes two forms: retained domestic sovereignty and the right to consent to any new rule or norm that might emanate from the IEO.[46] Depending on the organization, it may also retain the right to leave.[47] The ease of exit from the organization may make it more attractive to potential members and induce them to delegate more powers to the organization.[48] As is the case with shareholders investing in corporations, states joining and participating in an IEO do so because they believe that they will gain more from participation than from non-participation.[49]

The question of what responsibilities over what subject matters the members of the IEO will delegate or allocate to the organization is critical. The answer depends on whether the "allocation" is more valuable in the hands of the IEO or in the hands of the member state.[50] This allocation issue generally manifests itself in the distribution of powers and responsibilities between the institutions of the IEO and its members.[51] The assumption is that, while the IEO has been delegated some

41. *Id.*

42. *Id.*

43. *Theory of the Firm*, *supra* note 24, at 522.

44. *Id*. at 509. In a corporation, shareholders retain two types of residual rights: the right to residual value upon liquidation of the firm and the right to residual control. *Id.* Residual control means that to the degree that the rights to control have not been contracted away by either the shareholders or the corporation, the shareholders retain the authority and power to act as they determine. *Id*.

45. *Id.* at 509–10.

46. *Id.*

47. *See id.* at 509 (explaining that shareholders may breach their commitments to withdraw from the corporation and noting that states withdrawing from an IEO are similarly situated).

48. *See id.* at 513–14 (exploring how domestic desires for competition create a preference for ease of exit).

49. *See Theory of the Firm*, *supra* note 24, at 498–503, 510–21 (explaining the cost-benefit analysis of trade agreements, the behavior of shareholders in corporations, and the similarities between trade agreements and business entities).

50. *Id.* at 530 ("In this context, 'value' must be understood as the ability to satisfy state preferences at the lowest cost. The option will be 'bought' by the level of government that can make most efficient use of the responsibilities to satisfy the preferences expressed at that level of government.").

51. *Id.*

plenary powers (generally with limitations) by its members, the latter retain all remaining plenary powers.[52] The questions of what those delegated powers will be and how (and by whom) they will be exercised, as well as the location of any residual powers, are critical design issues on which the effectiveness of the organization may depend.[53] This makes an adequate effective dispute resolution mechanism an essential component of an IEO. States are more likely to join an IEO and delegate it more plenary powers, especially the power to formulate and implement policy without requiring unanimous member state consent for each decision, if the organization has a dispute resolution mechanism that is viewed as prompt, effective, and fair. An inadequate dispute resolution system in an IEO increases its participants' transaction costs and reduces their transaction gains, thereby making participation less desirable.[54]

The bottom line is therefore twofold. First, from the point of view of state actors in the international arena, membership and participation in an IEO is desirable so long as their gains from participation (taking into account all transaction costs and losses) exceed their gains from non-participation.[55] Second, from the point of view of the organization itself, there appear to be two critical measures of success: (1) the growth in the organization's responsibility[56] and (2) its pareto-efficiency.[57]

As this discussion makes clear, this analysis of an IEO is extremely hard to quantify. Indeed, this formula seems to be best applied to the evaluation of specific IEO policies or characteristics, rather than to the IEO in general.[58] This analysis,

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52. *Id.* ("Governments would retain residual rights of control if they are more valuable in the government's hands. They would transfer such control if by doing so they could increase their ability to achieve their preferences, either directly or by way of compensation from other governments.").

53. *Id.* at 534–35. In the case of the European Union, the location of this residual power is somewhat blurred because of "the tension between the limited powers of the European Union and the rather unlimited legislative authority needed to achieve those purposes." *Id.* Further complicating the issue is the concept of subsidiarity, enshrined in Article 2(2) of the Treaty on the Functioning of the European Union, which states that, in areas not falling within its exclusive competence, the European Union shall take action only "and in so far as the objectives of the proposed action cannot be sufficiently achieved by the member states and can therefore . . . be better achieved by the Community." Treaty on the Functioning of the European Union, art. 2(2), Mar. 30, 2010, J.O. (C 83) 01.

54. *Theory of the Firm*, *supra* note 24, at 527–29, 549–52 (applying cost-benefit analysis to state participation in IEOs and representing that analysis with a formula).

55. *Id.* at 499–500; s*ee also* Joel P. Trachtman, *Institutional Linkage: Transcending "Trade and . . ."*, 96 AM. J. INT'L. L. 77, 85 (2002) (explaining that states look for organizations that minimize transaction costs, thereby increasing the overall benefit).

56. *Theory of the Firm*, *supra* note 24, at 513–14 (explaining the importance of growth and increased responsibility by analogizing successful IEOs to expanding corporations).

57. An IEO is pareto-efficient if the members unanimously accept and abide by the general rules under which it operates. *Id.* at 516. This state is not, however, easily quantifiable. *Id.* at 518.

58. *See* Dunoff & Trachtman, *supra* note 28, at 19 (recognizing that market-based cost-benefit analyses are better equipped for more direct transactional issues than the complexities of international relations).

when applied to a series of frames of reference, yields a useful assessment of MERCOSUR's efficiency.[59] The result of this examination was a generally positive assessment of MERCOSUR, with a series of potentially troublesome indications.[60]

III. ECONOMIC TRENDS, 2004–2012

As discussed in Parts C–F of this Section, the economies of the original MERCOSUR member states from 2004 through the present generally grew rapidly between 2004 and 2008. That growth, however, shifted drastically after the 2008 financial crisis.

A. The 2008 Financial Crisis

The 2008 financial crisis caused a substantial reduction in exports from Latin America to the United States and Europe, as well as a substantial worldwide contraction in available credit, and a decrease in foreign direct investment.[61] This slowed the rate of growth in the MERCOSUR region.[62] As discussed below, the effects of this worldwide economic contraction varied from country to country.

B. Enter the Dragon

Since the 2008 financial crisis, China has substantially increased its presence in Latin America, both as a trader and an investor.[63] As a trader, China initially purchased raw materials for use in manufacturing,[64] but quickly switched to purchasing massive quantities of agricultural products to feed its growing population.[65] China has also developed a massive investment presence in Latin America, with Chinese investment now accounting for 9% of foreign direct

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59. These frames of reference include, inter alia: an ability to agree on norms; success in setting and creating norms; an increase in trade among the member states; private and public actor support; an increase in the number of trade disputes avoided or resolved among its members; general compliance with norms; and increase in applications for membership, all of which indicate growth, increasing responsibility, and pareto-efficiency. Porrata-Doria, Jr. *supra* note 1, at 44.

60. *Id.* at 69–72.

61. *Financial Contagion Has Already Reached the LAC Economies, Says Chief Economist*, THE WORLD BANK (Oct. 8, 2008), http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/LACEXT/0,,contentMDK:21933423~pagePK:146736~piPK:146830~theSitePK:258554,00.html.

62. *See* INTER-AMERICAN DEVELOPMENT BANK, MERCOSUR REPORT NO. 16 EXECUTIVE SUMMARY (2011) (describing the economic stall suffered by MERCOSUR nations in 2010 and 2011), http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=36712280.

63. Tom Thompson, *China and the Death of Latin America*, WALL ST. J. (Apr. 14, 2012), http://articles.marketwatch.com/2012-04-14/commentary/31338140_1_raw-materials-latin-america-china.

64. *Id.*

65. Emiko Terazono, *China's Growing Appetite for Cereals Pushes Corn Higher*, FIN. TIMES (Apr. 28, 2012). For example, China currently purchases 90% of Argentina's soy exports. Gwen Chen, Leslie Hook & Jude Webber, *China Looks to Argentina as Growing Source of Food*, FIN. TIMES (June 30, 2011).

investment in Latin America.[66] Most of this investment has targeted natural resources,[67] with massive investments in agricultural land in Brazil and Argentina,[68] and in energy purchases and investments.[69]

China has also substantially increased its exports of manufactured goods to Latin America in general, and Brazil in particular.[70] China's exports to Latin America have increased from $8 billion in 1999 to $130 billion in 2011.[71] Chinese goods exported to Brazil rose from 3% of Brazilian exports in 2008 to 14.5% in 2011.[72] China has also recently proposed to set up a credit line of $10 billion to support infrastructure programs in Latin America, and has expressed an interest in a free trade agreement with MERCOSUR.[73]

China has thus become a major player in the MERCOSUR area as an importer, exporter, and investor. This could be problematic. As discussed below, the massive quantities of cheap Chinese imports into Brazil have created problems for the Brazilian manufacturing sector.[74] Moreover, China's economy shows signs of slowing down.[75] A decrease in Chinese direct foreign investment in Brazil and Argentina, or a reduction in Chinese purchases of Brazilian and Argentine agricultural exports, could have a highly negative impact on the two largest MERCOSUR economies.

C. The Brazilian Economy

The Brazilian economy since 2004 has experienced an explosive increase in growth fueled by a number of factors. The first is a massive increase in the export

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66. *China Boosts Foreign Investment in Latin America*, BBC NEWS (May 5, 2011), http://www.bbc.co.uk/news/business-13294360 [hereinafter *China Boosts*].

67. *Id.*

68. Terazono, *supra* note 65. In Argentina, for example, a Chinese company is planning to invest $1.5 billion during the next ten years to develop land in Northern Argentina for soy farming. Chen, *supra* note 65.

69. Leslie Hook, *Latin Moves in China's Rush for Oil*, FIN. TIMES (Apr. 6, 2011). Another example is a recent purchase by Sinochem of a 40% interest in Brazil's Peregrino oil field for $3.1 billion. *Id.*

70. Brazil, with a population of over 200 million, is Latin America's largest consumer. *See* CENTRAL INTELLIGENCE AGENCY, THE WORLD FACT BOOK: BRAZIL, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/br.html (last updated Feb. 5, 2013) [hereinafter WORLD FACT BOOK: BRAZIL] (listing that 14.5% of imports come from China).

71. Samantha Pearson, *Foreign Flows Keep Brazilian Real Running Hot*, FIN. TIMES, (June 29, 2011), at 21.

72. Joe Leahy, *Brazilian Manufacturing Shrinks as China Imports Grow*, FIN. TIMES, (May 3, 2012), at 9.

73. *China Proposes $10bn Loan for Latin America Countries*, BBC NEWS (June 26, 2012), http://www.bbc.co.uk/news/business-18605450.

74. *See infra* notes 88–93 and accompanying text for a discussion on China's role in Brazil's slowing manufacturing.

75. Deepanshu Bagchee, *China's Slowdown is So Bad the Market is Cheering*, CNBC (Aug. 9, 2012), http://www.cnbc.com/id/48584634.

of a wide range of natural resources, from agricultural products to other raw materials—including iron ore and ethanol[76]—and manufactured goods,[77] which substantially increased revenues for the economy. Exports increased from $96.4 billion in 2004 to $256 billion in 2011,[78] with exports to MERCOSUR countries increasing from $8.9 billion to $82.94 billion during that time period.[79]

The discovery of vast hydrocarbon deposits in Brazilian waters was another favorable factor.[80] This expansion resulted in historically low unemployment figures,[81] together with a reverse brain drain, with professionals from all over the world seeking work in Brazil.[82] Foreign direct investment—especially Chinese agricultural investments[83]—was another factor that increased substantially, growing 90% in 2010.[84] Essentially, Brazil has been booming.

This expansion has brought a number of problems. Interest rates have increased substantially, reaching 12.25% in June of 2011.[85] The substantial inflow of cash has raised Brazilian exchange rates, resulting in an overvaluation of its

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76. Mark Broad, *Is Brazil's Economic Boom a Bubble Ready to Burst?*, BBC NEWS (June 27, 2011), http://www.bbc.co.uk/news/business-13932991; *see* Inae Riveras, *Brazil Hopes Shell-Cosan Can Boost Ethanol Exports*, REUTERS (Feb. 3, 2010), http://www.reuters.com/article/2010/02/03/us-cosan-shell-idUSTRE6124R520100203 (regarding Brazil's ethanol exports).

77. *See Brazil Exports, Imports & Trade*, ECONOMY WATCH (Mar. 15, 2010), http://www.economywatch.com/world_economy/brazil/export-import.html (listing footwear and automotives amongst Brazil's primary exports).

78. *MERCOSUR Statistical Tables*, CENTRO DE ECONOMIA INTERNACIONAL, http://www.cei.gov.ar/en/node/66 (last visited Sept. 18, 2012) (follow "BRASIL main economic indicators" for Brazilian data); WORLD FACT BOOK: BRAZIL, *supra* note 70.

79. *MERCOSUR Statistical Tables*, CENTRO DE ECONOMIA INTERNACIONAL, http://www.cei.gov.ar/en/node/66 (last visited Sept. 18, 2012) (follow "MERCOSUR exports" for MERCOSUR's data); *Mercosur RIP?*, THE ECONOMIST (July 14, 2012), http://www.economist.com/node/21558609.

80. Simon Romero, *In Brazil, Energy Finds Put Country at a Whole New Power Level*, N.Y. TIMES (Oct. 10, 2011), http://www.nytimes.com/2011/10/11/business/energy-environment/in-brazil-energy-finds-put-country-at-a-whole-new-power-level.html?pagewanted=all.

81. *Brazil Unemployment Rate*, TRADING ECONOMICS, http://www.tradingeconomics.com/brazil/unemployment-rate (last visited Jan. 23, 2013).

82. Juan Forero, *Expats Lured by Brazil's Booming Economy*, WASH. POST (Feb. 5, 2012), http://www.washingtonpost.com/world/americas/expats-lured-by-brazils-booming-economy/2012/01/13/gIQA4jnasQ_story_1.html (explaining, for example, work authorizations for foreigners increased from 961 thousand in 2010 to 1.5 million in 2011).

83. Terazono, *supra* note 65.

84. Moises Naim, *End the Party Before Brazil's Bubble Bursts*, FIN. TIMES, June 1, 2011, at 8.

85. *Id.* The easy availability of credit has substantially increased consumer debt, with Brazil currently being one of the most over-leveraged countries in the world. *Brazil's Boom has Finally Come to an End*, GLOBALPOST (Mar. 17, 2012), http://articles.businessinsider.com/2012-03-17/markets/31203631_1_consumer-credit-rio-de-janeiro-brazilians [hereinafter *Brazil's Boom*]. Credit defaults have increased substantially, with the individual default rate reaching 7.3% in early 2012. Rogerio Jelmayer, *New Brazilian Boom: Collecting Debts*, WALL ST. J. (Dec. 30, 2011), http://online.wsj.com/article/SB10001424052970204552304577116711955538568.html.

currency, the Real.[86] Moreover, the cost of living has increased substantially, with housing prices in Rio de Janeiro, for example, increasing by 80% in 2010.[87]

Growth slowed down considerably in 2011, with GDP rising only 2.7%, the smallest increase since 2003.[88] This slowdown was apparently the consequence of several factors. First, China became Brazil's biggest trade partner, with more than $56 billion in trade in 2011.[89] Second, trade with China consisted of the export of Brazilian raw materials, which China used to manufacture goods for export.[90] Third, the economic downturns in Europe and the United States reduced demand for Chinese goods, which in turn reduced Chinese demand for Brazilian raw materials.[91] Fourth, the massive increase in Chinese exports of manufactured goods to Brazil[92] negatively affected Brazil's manufacturing sector, which, because of Brazil's overvalued currency and high cost of labor, was less competitive. Finally, certain recent government policies toward the private sector, as well as slowdown in the service sector, also affected growth.[93]

At this point, projected growth for 2012 is 3.9%, an increase from 2011, but still low in comparison to prior years.[94] In spite of this slowdown, Brazil still has the largest and most vibrant economy in MERCOSUR, with a 2011 estimated population of 205 million, an unemployment rate of 6%, a GDP of $2.5 trillion, and exports of $250 billion.[95]

D. The Argentine Economy

After the economic crisis of 2000–2002,[96] Argentina's GDP grew by an average of 8.5% annually, as a result of previously idled industrial capacity and labor; an audaciously restructured and reduced debt burden; excellent international financial conditions; and expansionary monetary and fiscal policy.[97] As inflation increased, the government responded with expansionary fiscal and monetary policies, price restraints on business, and export taxes and restraints.[98] In 2008, the

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86. The exchange rate in Brazil as of early 2011 was 47% higher than its average in the previous decade. Naim, *supra* note 84.

87. Broad, *supra* note 76.

88. *Brazil's Boom*, *supra* note 85 (explaining that interest rates have fallen from an average of 12.5% in June of 2011 to 9.75% in early 2012).

89. *China Boosts*, *supra* note 66.

90. *China's Big Investment in Brazil Raises Concerns*, BBC NEWS (Nov. 15, 2012), http://www.bbc.co.uk/news/business-20351726.

91. *Brazil's Boom*, *supra* note 85.

92. Pearson, *supra* note 71; Leahy, *supra* note 72.

93. *Stalled,* THE ECONOMIST, Dec. 8, 2012, at 38–39.

94. *Id.*

95. WORLD FACT BOOK: BRAZIL, *supra* note 70.

96. Porrata-Doria, Jr., *supra* note 1.

97. CENTRAL INTELLIGENCE AGENCY, WORLD FACT BOOK: ARGENTINA, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/ar.html (last updated Feb. 11, 2013) [hereinafter WORLD FACT BOOK: ARGENTINA].

98. *Id.*

rapid economic growth of prior years began to slow sharply as government policies (including price caps and limits on imports and foreign exchange transactions) held back exports and the world economy fell into recession.[99]

Argentina's inflation worries are exacerbated by its government's apparent manipulation of econometric data published by the National Institute of Statistics and Census (INDEC), which has resulted in a substantial understating of the rate of inflation. The contrast between the official and unofficial inflation statistics is notable. The official statistics report inflation rates since 2007 to be between 5% and 11%, while independent, unofficial statistics suggest that the inflation rate during this period was closer to 25%.[100] Indeed, some foreign observers have stopped relying on official econometric data altogether.[101] In this era of economic instability, unreliable econometric data has masked massive economic instability in other countries[102] and may deter substantial investment.

Foreign investment in Argentina may also be deterred by two other issues. First, the current Argentine government has engaged in a policy of re-nationalization, bringing back into the state sector firms that had been previously privatized and sold, often to foreign investors.[103] A recent example is the nationalization of Yacimientos Petrolíferos Fiscales (YPF), Argentina's largest oil company, which was partially owned by Spanish investors. This nationalization was bitterly protested by the Spanish government and the European Union, both of which threatened to impose sanctions on Argentina.[104]

Second, there appears to be no effective recourse for a foreign investor who finds itself in a dispute with the Argentine government regarding its investment. In arbitration of investment disputes with private companies before the International Centre for the Settlement of Investment Disputes, Argentina has had a number of

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99. *Id.* Indeed, the economic growth rate forecast for Argentina in 2012 is around 2%—the lowest in Latin America. *The President and the Potbangers,* THE ECONOMIST, Sept. 29, 2012, at 39, *available at* http://www.economist.com/node/21563732 [hereinafter *The President*].

100. *The Blue Dollar: Another Step Towards a Siege Economy*, THE ECONOMIST (June 2, 2012), http://www.economist.com/node/21556273.

101. *Don't Lie to Me Argentina: Why We are Removing a Figure from Our Indicators Page*, THE ECONOMIST (Feb. 25, 2012), http://www.economist.com/node/21548242.

102. *Arithmetic Lesson: The Politics of Deficits and Economic Statistics*, THE ECONOMIST (Nov. 19, 2009), http://www.economist.com/node/14921406.

103. *Argentine Leader Moves to Nationalize Oil Company*, FOX NEWS (Apr. 16, 2012), http://www.foxnews.com/world/2012/04/16/argentine-leader-moves-to-nationalize-oil-company/. In 2010, the government spent approximately $3 billion to support some of these nationalized companies, such as the national airline and water company. Simon Romero & Emily Schmall, *Argentina Has Oil Firm in Its Sights*, N.Y. TIMES (Apr. 12, 2012), http://www.nytimes.com/2012/04/13/business/global/argentina-has-oil-firm-in-its-sights.html?_r=0; *see Cristina Scrapes the Barrel: No One will Suffer From the Nationalization of Argentina's Oil Giant More than the Argentines Themselves*, THE ECONOMIST (Apr. 21, 2012), http://www.economist.com/node/21553031 [hereinafter *Scrapes the Barrel*] (discussing nationalization of oil companies).

104. Raphael Minder & Simon Romero, *Spain Weighs Response to Nationalization of YPF*, N.Y. TIMES (Apr. 17, 2012), http://www.nytimes.com/2012/04/18/business/global/spain-weighs-response-to-nationalization-of-ypf.html; *see Scrapes the Barrel*, *supra* note 103 (discussing nationalization of oil company).

awards entered against it, which it has refused to recognize and pay, believing that it should be free to nationalize foreign investments.[105]

The Argentine government's continued reliance on expansionary fiscal and monetary policies has caused an economic slowdown, and risks the exacerbation of Argentina's already high inflation rate.[106]

E. The Paraguayan Economy

During the 1990s, Paraguay had the worst economic record of any MERCOSUR member state.[107] Its structural problems included lack of sea access (which substantially increased its transportation costs); a small domestic market; a small, poorly educated labor force; an extremely inadequate infrastructure; and a large "informal" (or unregistered and untaxed) sector.[108] Paraguay's principal exports consist of primary goods, which account for 60% of its exports.[109] It also has by far the lowest GDP of the MERCOSUR countries,[110] as well as the smallest percentage of foreign direct investment.[111]

The Paraguayan economy grew rapidly between 2003 and 2008, as growing world demand for commodities created a commodity-based export expansion.[112] Drought hit in 2008, reducing agricultural exports and slowing the economy before the onset of the global recession.[113] The economy shrank 3.8% in 2009, as lower world demand and lower commodity prices caused exports to contract.[114] The government reacted by introducing fiscal and monetary stimulus packages, which were highly successful.[115] This stimulus created 15% growth in 2010, which was the highest in South America.[116] As the stimulus ended, growth slowed to 6.4% in

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105. *Scrapes the Barrel*, *supra* note 103.

106. WORLD FACT BOOK: ARGENTINA, *supra* note 97; *The President*, *supra* note 99.

107. *See MERCOSUR Statistical Tables*, CENTRO DE ECONOMIA INTERNACIONAL, http://www.cei.gov.ar/en/node/66, (last visited Feb. 19, 2012) (providing economic records of all MERCOSUR states).

108. Carlos Ludeña, LAS ASIMETRÍAS EN EL MERCOSUR: APROXIMACIONES DE POLÍTICA COMUNITARIA Y SU IMPACTO EN EL PARAGUAY 3, Aug. 2008, *available at* http://www.eclac.org/comercio/noticias/paginas/4/34614/Las_Asimetrias_en_el_MERCOSUR.pdf.

109. *Id.* at 7.

110. In 2005, Paraguay's GDP per capita was $1,460. In contrast, Argentina's was $5,745, Brazil's was $5,177, and Uruguay's was $5,810. *Id.* at 5. Essentially, Paraguay's GDP per capita appears to be three to four times less than its MERCOSUR partners. *Id.*

111. Between 2003 and 2005, Paraguay's average foreign investment, measured in dollars per capita, was $8. In contrast, Uruguay's was $161, Argentina's was $93, and Brazil's was $79. *Id.* at 6.

112. CENTRAL INTELLIGENCE AGENCY, WORLD FACT BOOK: PARAGUAY, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/pa.html (last updated Feb. 5, 2012) [hereinafter WORLD FACT BOOK: PARAGUAY].

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

2011.[117]

In spite of its recent growth, Paraguay's structural problems continue and Paraguay remains the weakest economy in MERCOSUR and faces the greatest obstacles to growth.

F. The Uruguayan Economy

Uruguay's economy is very different from that of Paraguay. It has a small land area and a highly educated population.[118] Uruguay experienced high GDP growth rates during the 1990s, chiefly fueled by the service sector, which is the strongest sector in its economy.[119] In 2005, its GDP per capita was the highest in MERCOSUR.[120] Uruguay had a substantial economic crisis in 2002, when its banking system was disrupted and its currency collapsed, in part because of the presence in Uruguay of troubled Argentine banks.[121]

Between 2004 and 2009, Uruguay's robust external sector, with services, agricultural exports, tourism, and a high rate of foreign direct investment, created a high rate of economic growth of between 7% and 8%.[122] The 2008 global financial crisis dampened this robust rate of growth, which decelerated to 2.5% in 2009. Greater public expenditures and investment allowed Uruguay to keep positive growth rates, with GDP growth reaching 8.5% in 2010 and 6% in 2011.[123]

Uruguay faces two major challenges to its economic growth. First, its economy is deeply integrated with, and dependent on, the Argentine and Brazilian economies. Accordingly, the health of the Uruguayan economy is highly dependent on external economic and political events, and this dependence creates substantial volatility.[124] As noted above, the Uruguayan economic crisis of 2002 was in no small part caused by the economic crisis in Argentina at the time, which caused the collapse of the Argentine currency and banking system.[125] This has

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117. *Id.*

118. CENTRAL INTELLIGENCE AGENCY, WORLD FACT BOOK: URUGUAY, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/uy.html (last updated Feb. 5, 2012) [hereinafter WORLD FACT BOOK: URUGUAY].

119. Fernando Masi & Amaury Hoste, *Economic Development and Asymmetries in MERCOSUR: The Prospects of a MERCOSUR Regional Development Fund*, THE DANTE B. FASCELL NORTH-SOUTH CENTER WORKING PAPER SERIES, No. 4, 2–3 (2002).

120. Ludeña , *supra* note 108, at 5. S*ee supra* note 110, and accompanying text (discussing country GDPs).

121. Ricardo Hausmann, Andres Rodriguez-Clare & Dani Rodrik, *Towards a Strategy for Economic Growth in Uruguay*, *in* INTER-AMERICAN DEVELOPMENT BANK: ECONOMIC AND SOCIAL STUDY SERIES 2 (2005), *available at* http://www.hks.harvard.edu/fs/rhausma/new/uruguay05.pdf.

122. WORLD FACT BOOK: URUGUAY, *supra* note 118; Betts et al., *Country Strategy*, INTER-AMERICAN DEVELOPMENT BANK, *available at* http://www.iadb.org/en/publications/publication-detail,7101.html?id=25110%20&dcLanguage=en&dcType=All.

123. WORLD FACT BOOK: URUGUAY*, supra* note 118.

124. Hausmann et al., *supra* note 121, at 5–6.

125. WORLD FACT BOOK: ARGENTINA*, supra* note 97; see *supra* note 121 and accompanying text for a discussion on the role that trouble Argentine banks played in Uruguay's financial crisis.

created tensions between Uruguay and Argentina.[126]

Second, Uruguay requires substantial infrastructure refurbishment and expansion, especially in the areas of transportation, energy supply, and sanitation.[127] Unfortunately, this requires substantial investments of capital, which the Uruguayan government does not have.[128]

In summary, this recent economic history analysis of the MERCOSUR member states reveals substantial asymmetries and issues among them. Brazil is blessed with a booming economy, massive exports, and a growing global economic presence. Argentina's economy, a potential competitor to Brazil's, appears to be hobbled by inflation and restricted access to international capital. Uruguay's economy, which has recently experienced a high rate of economic growth, struggles with its dependence on the Brazilian and Argentine economies, and an economic infrastructure in need of substantial refurbishment and expansion. Paraguay's economy remains the weakest in MERCOSUR. This state of affairs seems to underscore the current Brazilian domination of MERCOSUR trade, with no real competition from any other member states. As discussed below, Brazil's economic dominance in MERCOSUR may be challenged by Venezuela's entry into the community.

IV. PRESIDENTS AND HEGEMONS

MERCOSUR is clearly an intergovernmental organization and lacks a supranational institutional structure.[129] If the MERCOSUR institutions, unable to act without the consensus of all the member states, are perceived as ineffective[130] and do not lead the integration process, as was the case with the supranational institutions of the European Union,[131] then someone or something else must push forward the integration process. In the case of MERCOSUR, it appears clear that member state presidential diplomacy, particularly the diplomatic interactions of the presidents of Argentina and Brazil, has played a major role in setting the MERCOSUR agenda and ensuring its progress. This role includes decision making

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126. An example of this tension involves the dispute between Argentina and Uruguay relating to the Uruguayan construction of cellulose processing plants on the Río de la Plata. Katherine Hancy Wheeler, *Uruguay Signs a TIFA with the U.S.: Will this Mean an Unraveling of Mercosur or is Montevideo Maneuvering to be Left Out in the Cold?*, COUNCIL ON HEMISPHERIC AFFAIRS (Feb. 1, 2007), http://www.coha.org/uruguay-signs-a-tifa-with-the-us-will-this-mean-an-unraveling-of-mercosur-or-is-montevideo-maneuvering-to-be-left-out-in-the-cold/.

127. Betts, *supra* note 122, at 2.

128. *Id.*

129. Porrata-Doria, Jr., *supra* note 1, at 61–62; Malamud: *Internal Agenda*, *supra* note 9, at 125, 127; THE LAW OF MERCOSUR 170, (Marcilio Toscano Franca Filho et al. eds., 2010).

130. Andres Malamud, *Presidentialism and Mercosur: A Hidden Cause for A Successful Experience*, *in* COMPARATIVE REGIONAL INTEGRATION: THEORETICAL PERSPECTIVES 53, 64 (2003), *available at* http://www.eui.eu/Personal/Researchers/malamud/Presidentialism_and_Mercosur_(Laursen_book).pdf [hereinafter Malamud: *Presidentialism*].

131. Malamud: *Internal Agenda*, *supra* note 9, at 127.

and policy setting, but also dispute settling and commitment guaranteeing. The political direction of MERCOSUR is routinely set by its members' presidents at yearly summits.[132] This state of affairs has been described as "interpresidentialism."[133]

The reasons for this state of affairs are varied. First, member state institutions are viewed as ineffective in making rapid decisions or solving problems.[134] Second, the political systems of the member states generally concentrate power in the executive, allowing the president to prevail easily over other competitors for power.[135] Given this concentration of power in the executive, private actors, such as individuals or private business groups, will funnel their lobbying efforts through the executive, the ultimate decision maker. Lastly, the presidents of the MERCOSUR member states have been traditionally given even greater room to maneuver in international affairs than in domestic affairs.[136]

Not all MERCOSUR presidents are equal. Only the presidents of Argentina and Brazil are said to have actually been running the MERCOSUR integration agenda. Several arguments are advanced in support of this thesis. First, MERCOSUR itself was formed through the interaction of the presidents of Argentina and Brazil.[137] Second, there is evidence that the personal intervention of the presidents of Brazil and Argentina between 1995 and 2001 allowed MERCOSUR agreement on several controversial norms and also resolved several potential crises.[138] Finally, Brazil and Argentina, because of their size and economic power, have been the natural hegemons of MERCOSUR.[139] They have had no natural economic competitors among the MERCOSUR member states.[140]

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132. *Id.* at 125.

133. *Id.*; s*ee generally* Laura Gómez-Mera, *Domestic Constraints on Regional Cooperation: Explaining Trade Conflict in MERCOSUR*, *in* REVIEW OF INTERNATIONAL POLITICAL ECONOMY 15 (2009), *available at* http://www.as.miami.edu/international-studies/pdf/Gomez-Mera%20RIPE%20ART.pdf.

134. Malamud: *Presidentialism*, *supra* note 130, at 112.

135. Andrés Malamud, *Presidential Diplomacy and the Institutional Underpinnings of MERCOSUR: An Empirical Examination*, 40 LATIN AMERICAN RES. REV. 138, 142 (2005), *available at* http://lasa-2.univ.pitt.edu/LARR/prot/fulltext/vol40no1/Malamud.pdf, [hereinafter Malamud: *Presidential Diplomacy*].

136. Gómez-Mera, *supra* note 133, at 12.

137. Porrata-Doria Jr., *supra* note 1, at 23–24; Malamud: *Internal Agenda*, *supra* note 9, at 116.

138. Malamud: *Presidential Diplomacy*, *supra* note 135, at 142–58.

139. *See* MARÍA INÉS TERRA, MERCOSUR: TREATMENT OF ASYMMETRIES AND ECONOMIC GROWTH 3 (2009), *available at* https://www.gtap.agecon.purdue.edu/resources/res_display.asp?RecordID=3085 (stating that Brazil has 70% of the territory and GDP, and 80% of the population, of the MERCOSUR area. Argentina has 23% of the territory and GDP and 16.8% of the population of the MERCOSUR area. No other member state comes close).

140. *See generally* Porrata-Doria, Jr., *supra* note 1, at 24–32 (arguing that the only possible competitor in terms of territory, GDP, and population, is Chile, but it has chosen to remain outside MERCOSUR and participate as an associate member, which gives it substantial independence (such as the ability to enter into free trade agreements with non-MERCOSUR countries, such as the United States), but little or no power within the community).

Essentially, in the absence of any competing or countervailing actors, the MERCOSUR integration agenda has been led through the personal interchange of the Argentine and Brazilian chief executives, who have found this process useful in achieving their national goals. This interchange appears to have been successful, at least for a time.[141]

This interchange is, however, problematic. Personal negotiations between powerful presidents are both time consuming and dependent on the personal relationship between the principals. It works best where the participants share common goals and ideology. When this agreement on goals and ideology breaks down, the process breaks down. Since the presidents of Argentina and Brazil are generally very busy, this interchange can only be used to deal with a few high priority items. It is also dependent on the personal power of the principals and their ability to control or silence any internal critics. Its use erodes the power and effectiveness of the MERCOSUR institutions. Lastly, this leadership process is very likely to alienate the presidents of Paraguay and Uruguay, MERCOSUR's smaller members, who are likely to feel excluded.

There is some evidence of a breakdown in this system. Although both Brazil and Argentina originally saw the MERCOSUR project as a source of commercial expansion and development, they actually have different visions of how to do this.[142] Brazil, with a much more diversified economy, is less dependent on the regional marketplace than Argentina.[143] It sees economic expansion as developing through increased global trade.[144] Its strategic and political goals have related to its achieving regional leadership in Latin America as a base for leadership in a larger global arena.[145]

Argentina, on the other hand, is much more dependent on the MERCOSUR regional market than Brazil, and views economic expansion as occurring through the expansion of the regional market through the admission of new members.[146] Moreover, there is an indication that inter-presidential cooperation between Argentina and Brazil has slowed down since the 2001 Argentine crisis.[147]

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141. *Id.* at 39–43.

142. Nicola Phillips, *The Rise and Fall of Open Regionalism? Comparative Reflections on Regional Governance in southern Cone of Latin America*, 24 THIRD WORLD QUARTERLY 217, 221 (2003), *available at* http://www.alternative-regionalisms.org/wp-content/uploads/2009/07/phillips_openregionalisminla.pdf.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* There are two problems here. First, as noted above, Brazil's economy is in the midst of a rapid expansion, and Argentina's is not. *See supra* notes 76–106 and accompanying text. Second, MERCOSUR's institutions are simply not up to the task of managing a community with a substantial number of additional members. Porrata-Doria, Jr., *supra* note 1, at 66–67.

147. Malamud: *Internal Agenda*, *supra* note 9, at 127. However, this process still works on occasion as exemplified by the June 2012 presidential agreement to suspend Paraguay from membership and admit Venezuela as a full member. *See* Simon Romero, *With Brazil as Advocate, Venezuela Joins Trade Block*, N.Y. TIMES (July 31, 2012), http://www.nytimes.com/2012/08/01/world/americas/mercosur-trade-bloc-admits-venezuela-as-

Furthermore, Brazil's booming economic power and growing global influence erodes the balance of power with Argentina.

As noted above, this system works as long as the actors' goals do not diverge and a powerful competitor does not seek to intervene in the process and impose a different agenda. Such a potential competitor is currently in place: Venezuela. Venezuela has a land area, population, and a diversified industrialized economy comparable to that of Argentina and Brazil.[148] Venezuela also has the largest hydrocarbons sector in Latin America.[149] Thus, Venezuela's economic strength has the potential to affect substantially the power dynamics in MERCOSUR.

Most importantly, Venezuela's autocratic former president did not share the traditional Argentine and Brazilian goals for the MERCOSUR project: economic and trade expansion. Venezuela's recently deceased President Hugo Chavez noted publicly that the MERCOSUR integration process should be political and social rather than economic, and that the state, and not the private sector, should be the base of all political and economic integration efforts.[150] Indeed, he expressed an intention to "reform and decontaminate MERCOSUR from neoliberal economics."[151] After Venezuela's commencement of full membership in MERCOSUR on July 31, 2012, it was expected that President Chavez would seek to implement his agenda, which seeks to turn MERCOSUR from a free trade organization to a state-oriented social development organization.[152] In spite of Brazil's current support for Venezuela,[153] any attempt by the new president to radically change MERCOSUR's nature will make inter-presidential cooperation much more difficult to achieve.

Moreover, as shown in the next section, Paraguay and Uruguay, MERCOSUR's smaller members, are now complaining that they are not full participants in MERCOSUR and, as a result, are being left behind economically. It seems clear that they will not remain content with a system where policy making and dispute resolution is solely the province of the presidents of Argentina, Brazil,

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full-member.html?_r=0 [hereinafter *Brazil as Advocate*].

148. Terra, *supra* note 139, at 3. Venezuela has a land area of 912,050 square kilometers, a population of approximately 28 million, and a GDP per capita of approximately $12,400, compared with Argentina's land area of 2 million square kilometers, population of 39 million people, and GDP per capita of $11,126. Brazil has a land area of 8.4 million square kilometers, a population of 184 million, and a GDP per capita of $7377. Venezuela has a greater GDP per capita than both Argentina and Brazil. *Id.*

149. *See generally* Rupert Rowling, *Venezuela Passes Saudis to Hold World's Largest Oil Reserves*, BLOOMBERG (June 14, 2012), http://www.bloomberg.com/news/2012-06-13/venezuela-overtakes-saudis-for-largest-oil-reserves-bp-says-1-.html.

150. Edmundo González Urrutia, *La Incorporación de Venezuela al MERCOSUR: Implicaciones Políticas en el Plano Internacional* 6 (Sept. 2007), *available at* http://library.fes.de/pdf-files/bueros/caracas/05550.pdf.

151. *See generally Chavez: Necesitamos más MERCOSUR, y yo diría un Nuevo MERCOSUR, una nueva arquitectónica* (Dec. 20, 2011), http://archivo.vtv.gob.ve/index.php/economicas/73478-chavez-necesitamos-mas-mercosur-y-yo-diria-un-nuevo-mercosur-una-nueva-arquitectonica.

152. *See infra* notes 281–82 and accompanying text.

153. *See generally Brazil as Advocate*, *supra* note 147.

and Venezuela. The problem is that, even if the presidents of Paraguay and Uruguay were included in the "inter-presidential decision-making group," the size of their countries and their economies would still prevent them from having an effective voice in MERCOSUR decision-making.

So, it appears that the system of informal presidential decision-making, led by the presidents of Argentina and Brazil, as the principal policy-making and agenda-setting instrument in MERCOSUR, will no longer work. If that is the case, then something else (such as powerful and influential MERCOSUR supranational institutions) must replace it in order for the MERCOSUR agenda to be able to move forward.

V. ASYMMETRIES AND CENTRIFUGAL FORCES

During the last ten years, MERCOSUR has been reluctant to confer differential treatment to its smaller members.[154] As noted above, however, it is also clear that Paraguay's and Uruguay's economies have manifested substantial disparities with those of Brazil and Argentina, and these disparities have not decreased.[155]

A. Discontent

There are signs that both Paraguay and Uruguay are dissatisfied with their status within MERCOSUR. At the summit where Venezuela announced its withdrawal from the Andean Community, representatives of Uruguay and Paraguay complained of mistreatment by Argentina and Brazil. They described a situation of "sub-imperialism," arguing that "Argentina and Brazil had long orchestrated programs within MERCOSUR that disproportionally benefitted their larger domestic markets" and noted that radical changes in regional policy were needed.[156]

Uruguay seemed to be particularly unhappy. In 2006, its Finance Minister complained that Uruguay was in a position where it depended entirely on the good will of Argentina and Brazil.[157] The asymmetries between the economies of the larger and smaller members of MERCOSUR were growing, and Uruguay was not seeing the benefits of MERCOSUR membership. Uruguay's bitter dispute with

154. TERRA, *supra* note 139, at 2.

155. *See* discussion *supra* Part III.E–F. Indeed, a commentator has actually argued that, because a substantial percentage of Paraguayan and Uruguayan exports (40% and 35% respectively) go to Brazil, their economies are essentially dependent on that of Brazil. Mario E. Carranza, *Can Mercosur Survive? Domestic and International Constraints on Mercosur*, 45 LATIN AMERICAN POLITICS AND SOCIETY 67, 82–83 (2003).

156. Kristin L. Brown, *Venezuela Joins Mercosur: The Impact Felt Around the Americas*, 16 LAW & BUS. REV. AM. 85, 90 (2010).

157. Wheeler, *supra* note 126, at 2; Benedict Mander, *Uruguayans Lose Faith in Trade Pact*, FIN. TIMES (Mar. 20, 2006), http://www.ft.com/cms/s/0/5feb6e12-b84a-11da-bfc5-0000779e2340.html#axzz23NCyaotu.

Argentina over a Uruguayan project for a paper mill on the Río de la Plata[158] did not make things better. Indeed, the Uruguayan government in 2006 suggested that it needed to explore trade relations other than MERCOSUR, such as a free trade agreement with the United States.[159]

B. Mollifying the Anger

MERCOSUR has attempted to deal with this discontent in a number of different ways. First, it has agreed to differential treatment for Paraguay in negotiations with third parties.[160] Second, Paraguay has been given preferential conditions involving rules of Origin.[161] Third, Paraguay has also received preferential treatment in raw materials, agricultural imports, capital goods, and information technology and telecommunications goods.[162]

Finally, and most importantly, MERCOSUR has created a "Structural Convergence Fund" (FOCEM) to alleviate this discontent—promoting structural convergence, developing competitiveness, and promoting social cohesion—particularly in its smaller economies and less developed regions.[163] This program will be discussed below.

C. FOCEM

FOCEM is divided into four program areas. The first program area, "Structural Convergence," includes the development of smaller economies and less developed regions.[164] The second program, "Development of Competition,"

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158. *See* International Court of Justice, *Application Instituting Proceedings, Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (filed May 4, 2006), *available at* http://www.icj-cij.org/docket/files/135/10779.pdf (discussing that Argentine environmental groups and the Argentine government strongly opposed the construction of two paper pulp mills in the trans-border between Argentina and Uruguay along the Río de la Plata. This dispute was eventually referred to the International Court of Justice).

159. Mander, *supra* note 157.

160. MERCOSUR, *External Negotiations*, Decision 28/03 (Dec. 15, 2003), *available at* http://www.mercosur.int/innovaportal/v/579/1/secretaria/decisiones_2003.

161. MERCOSUR, *Rules of Origin*, Decision 29/03 (Dec. 15, 2003), *available at* http://www.mercosur.int/innovaportal/v/579/1/secretaria/decisiones_2003.

162. MERCOSUR, *Special Import Rules*, Decision 32/03 (Dec. 15, 2003), *available at* http://www.mercosur.int/innovaportal/v/579/1/secretaria/decisiones_2003; MERCOSUR, *Goods and Telecommunications*, Decision 33/03 (Dec. 15, 2003), *available at* http://www.mercosur.int/innovaportal/v/579/1/secretaria/decisiones_2003; MERCOSUR, *Capital Goods*, Decision 34/03 (Dec. 15, 2003), *available at* http://www.mercosur.int/innovaportal/v/579/1/secretaria/decisiones_2003.

163. MERCOSUR *Fund for Structural Convergence of MERCOSUR*, Decision 45/04 (Dec. 16, 2004), *available at* http://www.mercosur.int/innovaportal/v/580/1/secretaria/decisiones_2004.

164. MERCOSUR, *Integracion y Funcionamiento del FOCEM,* at ¶¶ 2–3, Decision 18/05 (June 19, 2005), *available at* http://www.mercosur.int/innovaportal/v/1066/1/secretaria/decisiones_2005 [hereinafter MERCOSUR, Decision 18/05]. Projects in this area are expected to involve the construction and modernization of means of transport, electric energy facilities, and hydroelectric infrastructure. MERCOSUR, *Reglamento del FOCEM,* art. 30I, Decision 24/05, (12/8/2005), *available at* http://www.mercosur.int/innovaportal/v/1066/1/secretaria/decisiones_2005 [hereinafter

involves industrial and labor retraining to facilitate business creation and institutional and technical development.[165] The third program, "Social Cohesion," deals with the reduction of poverty and unemployment and the promotion of health and sanitation.[166] The last program, "Institutional Structural Strengthening," "is meant to strengthen and improve MERCOSUR's institutional structure.[167]

FOCEM received initial funding of $100 million, which is to be paid proportionally by the member states.[168] FOCEM funds are also to be allocated and distributed among the member states in a set proportion, with the vast majority of grants reserved for Paraguay and Uruguay.[169] Projects are to be selected for funding by each member state through a national technical unit. These national technical units are expected to present the projects for approval and monitor their implementation.[170] Essentially, each member state selects the projects it wishes to have FOCEM fund and monitors their implementation.

FOCEM has been funded since 2007 at the rate of $100 million a year, for a total of $600 million in contributions.[171] A substantial amount of these funds, however, have not yet been allocated for projects. The 2012 budget, for example, showed that $200.5 million had not yet been allocated for projects.[172]

An examination of the published project descriptions shows that, as expected, Paraguay is the principal FOCEM beneficiary, having been allocated fourteen projects totaling approximately $201 million, as well as additional special funding of $400 million (mostly funded by Brazil), for a special infrastructure project. The majority of these projects have involved road construction, water system

MERCOSUR, Decision 24/05].

165. MERCOSUR, Decision 18/05, *supra* note 164; MERCOSUR, Decision 24/05, *supra* note 164, art. 30 (discussing that these projects will generally involve the generation and diffusion of technical knowledge, sanitary control of agriculture, assistance to small and medium enterprises, and promotion of entrepreneurship businesses).

166. MERCOSUR, Decision 18/05, *supra* note 164, at 2 (stating that these projects will generally involve the promotion of education, jobs training, and health measures, especially the amelioration of infant mortality); MERCOSUR, Decision 24/05, *supra* note 164, art. 30, Part III.

167. MERCOSUR, Decision 18/05, *supra* note 164, at 2.

168. *Id.* at 3, art. 6 (explaining that Brazil was to be responsible for 70% of the funds, with Argentina contributing 27%, Uruguay 2%, and Paraguay 1%).

169. *Id.* at 3, art. 10 (explaining that project funding was to be distributed as follows: Paraguay 48%, Uruguay 32%, and Argentina and Brazil 10% each).

170. MERCOSUR, Decision 24/05, *supra* note 164, arts. 17–21.

171. MERCOSUR, *FOCEM Budget for 2008,* Decision 44/07 (Dec. 17, 2007), *available at* http://www.mercosur.int/innovaportal/v/634/1/secretaria/decisiones_2007; MERCOSUR, *FOCEM Budget for 2009*, Decision 51/08 (Dec. 15, 2008), *available at* http://www.mercosur.int/innovaportal/v/584/1/secretaria/decisiones_2008; MERCOSUR, *FOCEM Budget for 2010*, Decision 16/09 (Dec. 7, 2009), *available at* http://www.mercosur.int/innovaportal/v/1027/1/secretaria/decisiones_2009; MERCOSUR, *FOCEM Budget for 2011,* Decision 28/11 (Dec. 19, 2011), *available at* http://www.mercosur.int/innovaportal/v/2923/1/secretaria/decisiones_2011 [hereinafter MERCOSUR, Decision 28/11].

172. MERCOSUR, Decision 28/11, *supra* note 171.

improvements, and electrical infrastructure improvements.[173] Uruguay has received

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173. The projects are described as follows:

PARAGUAY	
MERCOSUR - Habitat de Promoción Social, Fortalecimiento de Capital Humano y Social en asentamientos en condiciones de pobreza	USD 12,915,680.00
Mercosur Roga	USD 9,705,882.00
Rehabilitación y mejoramiento de Carreteras de acceso y Circunvalación del Gran Asunción	USD 27,591,124.00
Programa de Apoyo Integral a Microempresas	USD 5,500,000.00
Laboratorio de Bioseguridad y Fortalecimiento del Laboratorio de Control de Alimentos	USD 4,800,000.00
Rehabilitación de Corredores Viales	USD 16,990,294.00
Construcción y Mejoramiento de Sistemas de Agua potable y Saneamiento Básico en Pequeñas Comunidades Rurales e Indígenas del País	USD 33,548,496.00
Pavimentación asfáltica sobre empedrado del tramo alimentador de la Ruta 8, corredor de integración regional, Ruta 8 – San Salvador – Borja Iturbe y Ramal a Rojas Potrero	USD 6,344,800.00
Desarrollo de Productos Turísticos Competitivos en la Ruta Turística Integrada Iguazú Misiones, Atractivo Turístico del MERCOSUR	USD 1,302,730.00
Pavimentación asfáltica sobre empedrado del tramo alimentador de las Rutas 6 y 7, corredores de integración regional, Pdte. Franco - Cedrales	USD 5,846,500.00
Pavimentación asfáltica sobre empedrado del tramo alimentador de la Ruta 2, corredor de integración regional, Itacurubi de la Cordillera – Valenzuela – Gral. Bernardino Caballero	USD 5,186,500.00
Recapado del tramo alimentador de las Rutas 1 y 6, corredores de integración regional, Ruta 1 (Carmen del Paraná) – La Paz, Ruta Graneros del Sur	USD 4,004,000.00
MERCOSUR YPORÃ - Promoción de acceso al agua potable y saneamiento básico en comunidades en situación de pobreza y extrema pobreza	USD 7,588,848.00
Construcción de la Línea de Transmisión 500 kv Itaipú-Villa Hayes, la Sub-Estación Villa Hayes y la Ampliación de la Sub-Estación Margen Derecha Itaipú	USD 555,000,000.00
Desarrollo Tecnológico, Innovación y Evaluación de la Conformidad – DeTIEC	USD 6,470,588.00
Rehabilitación y Pavimentación asfáltica del tramo Concepción – Puerto Vallemí	USD 99,788,565.00

eight projects totaling approximately $147 million, with the majority of them involving road, railroad, and electrical system construction.[174] Brazil and Argentina have been allocated a much smaller number of projects, with Argentina being allocated three projects totaling approximately $19 million[175] and Brazil

Construcción Autopista Ñugauzú: Asunción - Luque (6,3km)	USD 27,576,525.00
COF s/f Construcción de la Avenida Costanera Norte de Asunción - 2ª Etapa (11,522 Km)	USD 59,196,693.00

MERCOSUR, Decision 28/11, *supra* note 171; *see also* FOCEM, MERCOSUR, http://www.mercosur.int/focem/index.php?id=paraguay1 (describing the projects for Paraguay).

174. For Uruguay:

URUGUAY	
Ruta 26 - tramo Melo – “Arroyo Sarandi de Barceló	USD 7,929,269.00
Internacionalización de la especialización productiva, desarrollo y capacitación tecnológica de los sectores de software, biotecnología, electrónica y sus respectivas cadenas de valor	USD 1,500,000.00
Fortalecimiento de comunidades locales con proyectos de Economía Social de Frontera	USD 1,646,820.00
Desarrollo de Capacidades e Infraestructura para Clasificadores Informales de Residuos Urbanos en Localidades del Interior del Uruguay	USD 1,882,000.00
Intervenciones Múltiples en Asentamientos ubicados en Territorios de Frontera con Situaciones de Extrema Pobreza y Emergencia Sanitaria, Ambiental y Hábitat	USD 1,411,765.00
Ruta 12: Tramo Empalme Ruta 54 – Ruta 55	USD 4,371,000.00
Interconexión Eléctrica de 500 MW Uruguay-Brasil	USD 106,660,000.00
Rehabilitación de Vías Ferreas, línea Rivera: tramo Pintado (Km 144) - Frontera (Km 566)	USD 74,830,970.00
Internacionalización de la especialización productiva, desarrollo y capacitación tecnológica de los sectores de software, biotecnología, electrónica y sus respectivas cadenas de valor. 2da etapa	USD 3,750,000.00

FOCEM, MERCOSUR, http://www.mercosur.int/focem/index.php?id=uruguay1 (last visited Aug. 30, 2012) (describing the projects for Uruguay).

175. For Argentina:

ARGENTINA	
Proyecto de Interconexión en 132kv entre ET 500 Kv Iberá y ET 132 Kv Paso de los Libres Norte	USD 19,057,519.00

receiving five projects totaling approximately $35 million.[176]

Evaluating FOCEM is very hard because it has been in existence for only a short period of time. One primary question that comes to mind is what FOCEM is expected to accomplish. Its charter seems to indicate only that it is to "promote structural convergence, social cohesion and regional development."[177] These are highly generalized concepts, and, since there is no centralized development plan for the use of these funds, the member states have substantial discretion in their use of the funds.

The few studies of FOCEM that have been completed to date seem to indicate that it has had, and will continue to have, a positive effect on welfare, especially in Paraguay, whose infrastructure is much less developed than that of the other member states. In fact, these studies indicate that FOCEM funding has actually had a major positive impact on Paraguay.[178]

The problem seems to be, however, that the current level of funding is not

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Intervenciones Integrales en los Edificios de Enseñanza Obligatoria en los Departamentos General Obligado, Vera, 9 de Julio, Garay y San Javier –Provincia de Santa Fe	USD 7,933,899.00
PYMES Exportadoras de bienes de capital, planta llave en mano y servicios de ingeniería.	USD 672,000.00

FOCEM, MERCOSUR, http://www.mercosur.int/focem/index.php?id=argentina1 (describing the projects for Argentina, which involved assistance to small and medium firms, school improvements, and road construction).

176. For Brazil:

BRASIL	
Projeto de Implantação da Biblioteca UNILA - BIUNILA e do Instituto MERCOSUL de Estudos Avançados - IMEA, da Universidade Federal da Integração Latino-Americana – UNILA	USD 22,000,000.00
Intensificación y Complementación Automotriz en el ámbito del MERCOSUR	USD 3,929,244.00
Calificación de Proveedores de la Cadena Productiva de Petróleo y Gas	USD 3,672,236.00
Ampliación del Sistema de Saneamiento de Ponta Porã - MS	USD 6,136,207.00
Obras de Engenharia do Sistema de Esgotamento Sanitário da Cidade de São Borja-RS	USD 9,987,176.00

FOCEM, MERCOSUR, http://www.mercosur.int/focem/index.php?id=brasil1 (describing that these projects involved educational facility improvements, water infrastructure inspection, assistance to automotive sector integration, and production assistance for the oil and gas industries).

177. *See supra* Part V.C. *But see* THE LAW OF MERCOSUR, *supra* note 129 (discussing that the intention behind FOCEM was that funds were to be principally used for addressing infrastructure inadequacies in the smaller and less developed member states).

178. Terra, *supra* note 139, at 17; Ludeña , *supra* note 108, at 2.

enough to meet the needs of Uruguay and Paraguay. Indeed, the author of one of the FOCEM studies calls for funding to be increased by assigning to it all MERCOSUR customs tariff collections (currently around $8 billion), and notes that only this level of funding will enable the major structural asymmetries of Paraguay and Uruguay to be appropriately addressed.[179] Absent this kind of expansion, the prediction is that not much will change. Uruguay's position vis-à-vis the other members (and its economic dependency on Argentina and Brazil) will remain the same. Paraguay's infrastructure and markets are so far behind those of the other member states that, even with substantial additional infrastructure improvements and growth fueled by FOCEM funding, it will still remain far behind the economies of the other members.

Therefore, the problem seems to be that, absent a major change in FOCEM funding, Paraguay's and Uruguay's infrastructures and market deficiencies will continue unresolved. If that is the case, then both countries will be facing the Trachtman dilemma: why should they stay in MERCOSUR (or work to make it more effective)? What's in it for them?

FOCEM may actually increase this tension. Its creation has made MERCOSUR morph its role from a purely free trade organization to one involved in free trade and economic development. As noted elsewhere, these goals may not necessarily be viewed by all participants as consistent with each other.[180] FOCEM creates a system where the "have" countries are essentially giving "foreign aid" to the "have not" countries. This may intensify Paraguay and Uruguay's dependence, or perception of dependence, on Brazil and Argentina. Since the needs of the "have not" countries are so great, the granting of assistance will tend to fuel a demand for yet more assistance. At some point, the "have" countries are going to be reluctant to furnish additional funding. At that point, as was the case in Latin American Free Trade Association in the 1960s and 1970s, there is a risk that a confrontation over this issue may arise and trigger the demise of the organization.[181]

VI. INSTITUTION BUILDING: THE PARLIAMENT AND COREPER

MERCOSUR is essentially organized as an intergovernmental organization and has suffered from a deficit of the independent, supranational institutions seen in other international economic organizations.[182] In recent years, MERCOSUR has sought to deal with this issue in part by creating two new organizations, the Parliament (PARLASUR) and the Committee of Permanent Representatives (COREPER). Both of these institutions are examined below.

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179. Terra, *supra* note 139, at 16.

180. RAFAEL A. PORRATA-DORIA, JR., MERCOSUR: THE COMMON MARKET OF THE SOUTHERN CONE 13–14 (2005).

181. *Id.*

182. Porrata-Doria, Jr., *supra* note 1, at 61–62.

A. The MERCOSUR Parliament (PARLASUR)

PARLASUR, created by the MERCOSUR Council in December 2005,[183] was meant to replace the Joint Parliamentary Commission created by the Treaty of Asunción, MERCOSUR's constitutive document,[184] and commenced operations in May 2007.[185]

The European Union provided massive technical assistance and financial support to the MERCOSUR parliamentary project,[186] and the designers of PARLASUR used the European Parliament as a model.[187] As will be shown, however, PARLASUR and the European Parliament are very different institutions.

PARLASUR's stated purposes are to represent the peoples of MERCOSUR; defend democracy, freedom, and peace; guarantee the participation of the people in the integration process; and contribute to the deepening and expansion of MERCOSUR.[188] It appears that it was intended to reduce the monopoly of power by the national executives, to foster popular participation and citizen representation, and to legitimize any legal rules adopted by the Council.[189]

PARLASUR is unicameral,[190] and after a transition period that is to end on December 31, 2014, its members are to be directly elected by the peoples of the member states.[191] The Protocol that created PARLASUR did not specify the number of representatives, other than to state that they shall be elected by unspecified "popular representation criteria."[192] The Protocol did provide, however, that for the transition period, each member state would have eighteen representatives.[193]

The issue of proportional representation in PARLASUR has been quite controversial. The concern was that, because of the great population disparity

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183. MERCOSUR, *Establishing Protocol PARLASUR*, Decision 23/05 (Dec. 9, 2005), *available at* http://www.mercosur.int/innovaportal/v/1066/1/secretaria/decisiones_2005.

184. MERCOSUR, *MERCOSUR Parliament*, Decision 49/04 (Dec. 16, 2004), *available at* http://www.mercosur.int/innovaportal/v/580/1/secretaria/decisiones_2004; *see also* MERCOSUR, *Additional Protocol to the Treaty of Asunción on the Institutional Structure of MERCOSUR: Protocol of Ouro Preto*, arts. 22–30, (Dec. 17, 1994), *available at* http://www.mercosur.int/innovaportal/file/721/1/cmc_1994_protocolo_ouro_preto_es.pdf.

185. María Victoria Álvarez Macías, *Dos Años de Funcionamiento del Parlamento del MERCOSUR: Una Evaluación Preliminar*, 1 INTEGRACION Y COOPERACION INTERNACIONAL 2 (Oct.–Dec. 2009), *available at* http://www.cerir.com.ar/admin/_cerir/archivos/publicaciones/1/Revista%20Nro.%201.pdf.

186. Clarissa F. Dri, *Limits of the Institutional Mimesis of the European Union: The Case of the Mercosur Parliament*, 1 LATIN AMERICAN POLICY 52, 59–61 (2010), *available at* http://onlinelibrary.wiley.com/doi/10.1111/j.2041-7373.2010.00004.x/full.

187. *Id.* at 65–71.

188. MERCOSUR, Decision 23/05, *supra* note 183, art. 2.

189. THE LAW OF MERCOSUR, *supra* note 129, at 47; Malamud, *Internal Agenda*, *supra* note 9.

190. MERCOSUR, Decision 23/05, *supra* note 183, art. 1.

191. *Id.* at Transitional Provisions, First–Third.

192. *Id.* art. 5(1).

193. *Id.* at Transitional Provisions, Second.

among the member states, direct proportional representation based on population would result in a Brazilian supermajority to the exclusion of all other member states.[194] A political accord entered into by PARLASUR in April 2009[195] and approved by the Council in 2010,[196] resolved the issue by introducing the concept of "attenuated proportionality."[197]

The Protocol also stated that, commencing at the second transition period (beginning January 1, 2011), all member state representatives should be elected.[198] That has not happened. Paraguay directly elected its MERCOSUR representatives in 2008,[199] but to date, no other member state has. A Parliamentary recommendation proposed that the Parliament Protocol be amended to postpone elections beyond December 31, 2014,[200] but as of the date of this writing, that recommendation does not appear to have been approved.[201] Thus, at this point, it is unclear when direct elections for members of Parliament will take place.

Most of the powers given to PARLASUR by the Protocol are of a liaison and consultative nature. Parliament may make recommendations;[202] request

194. María Claudia Drummond, *Citizen Representation in the MERCOSUR Parliament, Construction of the Political Agreement*, PUENTE @ EUROPA ANO VII NUMERO ESPECIAL, Dec. 2009, *available at* http://www.ba.unibo.it/NR/rdonlyres/8B85726D-C753-4770-B3AA-B7E5110F8A57/170962/PuenteEuropaEspA7Drummond.pdf; Álvarez Macías, *supra* note 185, at 12.

195. MERCOSUR Parliament, *Political Agreement for Consolidation and Proposals Seen for MERCOSUR*, Apr. 28, 2009, *available at* http://www.parlamentodelmercosur.org/innovaportal/file/4594/1/acuerdo_politico.pdf [hereinafter *Political Agreement*].

196. MERCOSUR Agreement, Oct. 18, 2010, Decision 28/10, *Criterio de Representacion Ciudadana*, *available at* http://www.mercosur.int/innovaportal/v/2376/1/secretaria/decisiones_2010.

197. *Political Agreement*, *supra* note 195. Under the concept of attenuated proportionality, national representation in PARLASUR would be apportioned in 2014 as follows: Brazil 75, Argentina 43, Paraguay and Uruguay 18 each. *Id.* No mention is made of Venezuela.

198. MERCOSUR, Decision 23/05, *supra* note 183, at Secciones Transitorias, Tercera.

199. *See Electoral Tribunal Paraguayan elections results published by the MERCOSUR Parliament,* WE MERCOSUR, May 2008, *available at* http://www.somosmercosur.net/boletin/mayo-2008/tribunal-electoral-publico-resultados-de-elecciones-paraguayas-al-parlamento-del-mercosur-cinco-partidos-estarán-representados; Electoral Court of Justice, Aug. 20, 2007, Res. TSJE No. 55/2007, *Convocation to Elections*, *available at* www.tsje.gov.py/legislacion/resolucion/2007/55.htm.

200. MERCOSUR Parliament, Dec. 13, 2010, Recommendation 16/2010, *Protocol Implementation Guidelines Establishing and Strengthening Political Agreement for the MERCOSUR.*, *available at* http://www.parlamentodelmercosur.org/innovaportal/file/5294/1/rec_16_2010_aplicacion_pcpm.pdf.

201. *See* Ruben Martínez Huelmo, *La Situación del Parlamento del MERCOSUR* Espectador Negocios, *available at* http://biz.espectador.com/especialmercosur_core.php?m=amp&nw=MzQzNQ== (last visited Feb. 19, 2013).

202. MERCOSUR, Decision 23/05, *supra* note 183, art. 19.

information;[203] give advice on pending legislation;[204] issue reports and recommendations;[205] channel grievances from citizens to MERCOSUR institutions;[206] liaise with other institutions;[207] and give its opinions on the admission of new member states.[208] It may also consult with and request Advisory Opinions from the Permanent Revision Tribunal, but appears never to have done so.[209] These powers do not include the power to draft the institution's budget, which the European Parliament has,[210] or to make or veto any rules. Unlike the European Parliament,[211] PARLASUR has no real legislative powers.[212]

The only quasi-legislative powers that PARLASUR has are to present draft MERCOSUR norms to national parliaments, which it has done once,[213] and to present draft legislation on MERCOSUR norms to the Council,[214] which it has done four times since 2007.[215] A review of the MERCOSUR website shows the majority of PARLASUR's work to be deliberations and recommendations. It clearly does not seem to be acting as a legislative body and does not seem to be very busy. Indeed, the MERCOSUR website shows no PARLASUR activity after 2010.[216]

Three significant, unresolved issues affect the ability of PARLASUR to function. The first is the direct election of its members. As set forth in the Protocol, the members of PARLASUR should have been elected by now but, with the exception of Paraguay, they have not. No other elections have occurred, and no attempt has been made to set up a date for the common 2014 election set forth in the Protocol.[217] The Protocol quite specifically states that members of PARLASUR are to be appointed only through the end of the first transition period, which ended in December of 2010.[218] The Council has not formally extended this power of appointment, so the legal status of the representatives of Argentina, Brazil, and Uruguay may be doubtful. Indeed, one member of the PARLASUR describes it to

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203. *Id*. art. 4(4)–(7).

204. *Id*. art. 4(12).

205. *Id*. art. 4(3), (11).

206. *Id*. art. 4(10).

207. *Id*. art. 4(8)–(9), (15), (16).

208. MERCOSUR, Decision 23/05, *supra* note 183, art. 8.

209. *Id.* art 13.

210. *See* Treaty on the Functioning of the European Union, *supra* note 53, arts. 223–234, Mar. 30, 2010, 2010/C 83/01.

211. Dri, *supra* note 186, at 57.

212. Malamud: *Internal Agenda, supra* note 9, at 127; Dri, *supra* note 186 at 67–68; Álvarez Macías, *supra* note 185, at 5.

213. MERCOSUR, Decision 23/05, *supra* note 183, art. 4(14); Álvarez Macías, *supra* note 185.

214. MERCOSUR, Decision 23/05, *supra* note 183, art. 4(13).

215. Álvarez Macías, *supra* note 185.

216. *Id.*

217. MERCOSUR, Decision 23/05, *supra* note 183, at Transitional Provisions, Third.

218. *Id.* at Transitional Provisions, First–Third.

be in "suspended animation."[219] It may be that, in the absence of Council action providing for the continued appointment of members or an agreement by the member states to hold elections, PARLASUR may currently have no validly selected members.

The second critical issue is that of the status of PARLASUR's Paraguayan members. Paraguay was suspended from MERCOSUR after its legislature impeached President Fernando Lago.[220] The President of PARLASUR, who is Paraguayan, was excluded from the recent MERCOSUR summit because of his nationality.[221] If this suspension means that Paraguay is no longer a member of MERCOSUR—at least temporarily—then Parliament has just lost one third of its membership. Given the fact that Paraguay is the only member state that has directly elected its representatives (and therefore the only member state in compliance with the transition provisions of the Protocol), its suspension may mean that, at this point, Parliament has no validly elected members. This issue must be resolved.

Lastly, the admission of Venezuela to MERCOSUR reopens the proportional representation debate. Although the Political Accord discussed above[222] introduced the concept of attenuated proportionality, it did not mention Venezuela and did not apportion a specific number of seats to Venezuelan representatives. Since Venezuela has a substantial population,[223] it is likely to demand substantial representation. It appears that the previous attempt at resolution of this issue, which resulted in a political agreement approved by the Council, did not consider the issue of Venezuelan representation.[224] Given Parliament's current troubles, it seems unlikely that such a process will be repeated. Negotiations need to be reconvened to resolve these issues.

B. The Committee of Permanent Representatives (COREPER)

COREPER, created in 2003,[225] is composed of a president and a representative from each member state.[226] It seems to have copied the European Union's Committee of Permanent Representatives, which has a substantial role in the European Union and plays a pivotal role in the E.U. decision-making system.[227]

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219. *Id.* at Transitional Provisions, Third.

220. *See infra* note 262 and accompanying text.

221. *See Impiden Ingreso del Presidente del Parlasur en Cumbre del MERCOSUR,* ÚLTIMA HORA (June 28, 2012), *available at* http://www.ultimahora.com/notas/540961-Impiden-ingreso-del-presidente-del-Parlasur-en-Cumbre-del-Mercosur.

222. *See supra* notes 194–97 and accompanying text.

223. UN STATS, VENEZUELA (BOLIVARIAN REPUBLIC OF), http://unstats.un.org/unsd/pocketbook/PDF/Venezuela%20(Bolivarian%20Republic%20of).pdf.

224. *See Political Agreement*, *supra* note 195.

225. MERCOSUR Agreement, Oct. 6, 2003, Decision 11/03, *MERCOSUR Committee of Permanent Representatives, available at* http://www.mercosur.int/innovaportal/v/579/1/secretaria/decisiones_2003.

226. *Id.* art. 2.

227. Treaty on the Functioning of the European Union, *supra* note 53, art. 240; Robert

COREPER has three missions: (1) to assist the Council in any activities at their request; (2) to present initiatives relating to the integration process in MERCOSUR; and (3) to strengthen economic, social, and parliamentary relations within MERCOSUR.[228] The President is expected to be a distinguished politician who is nominated by the presidents of the member states. The President may represent MERCOSUR before external bodies.[229] The consensus appears to be that COREPER has no decision making or implementation power and thus has not been very active.[230]

MERCOSUR's attempt to address its lack of effective supranational institutions through the creation of PARLASUR and COREPER appears to have been unsuccessful given the problems described above.

VII. THE DISPUTE RESOLUTION MECHANISM: PLUS, CHANGE . . .

MERCOSUR's dispute resolution procedures, even as strengthened by the Brasilia and Olivos Protocols,[231] were not adequate for a number of reasons. First, the new "appellate tribunal" (the Permanent Revision Tribunal) was essentially an arbitration panel whose membership changed from case to case and whose decisions would not necessarily establish a coherent jurisprudence. Second, the system's enforcement mechanisms were weak, since a unanimous decision to sanction a member for failure to comply with an award is highly unlikely. Third, the system was not transparent. All of these inadequacies made the MERCOSUR dispute resolution system ineffective.[232]

Because of these inadequacies, a member state, which generally abides by the rules and is aggrieved by another state's non-compliance with a MERCOSUR norm, would probably decide that it had no effective means of protecting its interests within MERCOSUR. Moreover, member states would have little incentive to comply with community norms, since no effective sanctions could be enforced against them.[233] The pre-Olivos dispute resolution system had been used only a limited numbers of times, which is itself additional evidence of its ineffectiveness.[234]

Eight years later, the question that arises is whether the MERCOSUR dispute

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Bouzas, *Deepening Integration of MERCOSUR: Dealing with Disparities* 7 (Inter-American Development Bank, Jan. 2005), *available at* http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=36246966; *Coreper*, EUROFOUND, http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/coreper.htm (last updated Jan. 13, 2011); s*ee Coreper, Europe's Managing Board*, THE ECONOMIST (Aug. 6, 1998), http://www.economist.com/node/170753.

228. MERCOSUR, Decision 11/03, *supra* note 225, art. 4.

229. *Id.* arts 2–5.

230. Bouzas, *supra* note 227, at 7; Malamud, *Internal Agenda*, *supra* note 9, at 127. Indeed, a search of the MERCOSUR website uncovered no evidence of any documents prepared by COREPER. *See* MERCOSUR, http://www.mercosur.int.

231. *See Protocol of Ouro Preto*, *supra* note 184, art. 43; Olivos, *supra* note 14, arts. 17–23.

232. Porrata-Doria, Jr., *supra* note 1, at 23–24, 64.

233. *Id.* at 64.

234. *Id.* at 24.

resolution system evolved into a more effective system than predicted. An effective dispute resolution system would be one that was used a fair amount; that generated a body of jurisprudence that has been cited and followed; and that shows some evidence that the parties have agreed to be bound by its decisions.[235]

A review of the ad hoc arbitration panels' output and the Permanent Revision Tribunal makes it clear that the MERCOSUR dispute resolution system remains highly ineffective. Since the Olivos Protocol, two arbitral awards have been entered by the ad hoc tribunals. First, dealing with an Argentine statute prohibiting the importation of Uruguayan refurbished tires, was revoked by, and is the subject of, four of the six awards issued to date by the Permanent Revision Tribunal.[236] The second involved a complaint by Uruguay that, by failing to take prompt and effective action to clear demonstrators blocking bridges on the principal transportation routes between Argentina and Uruguay, Argentina violated the MERCOSUR guarantee of free movement of goods.[237] The panel concluded that Argentina had indeed violated this guarantee but declined to grant Uruguay a remedy.[238]

Four of the six Permanent Revision Tribunal awards issued since its inception involved the refurbished tires case described above.[239] The first award held that,

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235. *See, e.g.*, Laurence R. Helfer, et al., *Islands of Effective International Adjudication: Constructing an Intellectual Property Rule of Law in the Andean Community,* 103 AM.J.INT'L. L. 1 (2009) (describing the development of an effective intellectual property law jurisprudence in the Andean Community).

236. Award of the MERCOSUR Ad Hoc Tribunal constituted to hear the dispute by the Republic of Uruguay to Argentina on "Prohibition of Import of Remolded Tires," MERCOSUR Ad Hoc Tribunal, Oct. 25, 2005, *available at* http://www.mercosur.int/msweb/portal%20intermediario/es/controversias/arquivos/TPR_Tribunal%20AdHoc_Laudo%20Libre%20Circulacion_ES.pdf.

237. Award of the MERCOSUR Ad Hoc Tribunal constituted to hear the dispute filed by the Oriental Republic of Uruguay to Argentina on Argentine State's failure to take appropriate measures to prevent and/or eliminate the impediments to free circulation stemming from cuts Argentine Territory gateways to the International Bridge linking Argentina with the Oriental Republic of Uruguay, MERCOSUR Ad Hoc Tribunal, Sept. 6, 2006, *available at* http://www.mercosur.int/innovaportal/file/Laudo%20de%20Cortes%20de%20Ruta%20-%20ES.pdf?contentid=375&version=1&filename=Laudo%20de%20Cortes%20de%20Ruta%20-%20ES.pdf.

238. *Id.*

239. The fifth award involved an Argentine appeal from the award in favor of Uruguay in the demonstrations case, which the Tribunal dismissed in limine on procedural grounds; Laudo 2/2006 (Uruguay v. Argentina) *Impedimentos a la libre circulacion derivado de los cortes en territorio argentino de vias de acceso a los puentes internacionales gral* [*Impediments to Free Movement*], MERCOSUR Permanent Revision Tribunal June 8, 2007, *available at* http://www.mercosur.int/innovaportal/file/Laudo%20de%20Cortes%20de%20Ruta.tif?contentid=375&version=1&filename=Laudo%20de%20Cortes%20de%20Ruta.tif. The sixth award, issued on July 21, 2012, involved an emergency proceeding under Decision 23/04 filed by Paraguay challenging its suspension from MERCOSUR and Venezuela's admission as a full member and seeking provisional measures. The Tribunal dismissed the proceeding on procedural grounds, asserting, inter alia, that the requirements for an emergency proceeding under Decision 23/04 had not been met and that a direct action seeking provisional measures could not be filed without the

since the Argentine statute regarding Uruguayan refurbished tires violated MERCOSUR norms, Argentina was required to repeal or modify it.[240] Other awards involved an Argentine request for clarification of the original award;[241] an Argentine claim that the safeguard measures imposed on Argentina by Uruguay in response to the former's failure to comply with the original award were excessive;[242] and a Uruguayan claim that Argentina's eventual modification of the statute in question did not comply with the requirements of the original award.[243] Clearly, what we have here is a situation where one party has refused to comply with a Tribunal decision, and the Tribunal has not been able to enforce its decision.

At the request of the highest court of a member state, the Permanent Revision Tribunal has the power to issue Consultative Opinions on issues of MERCOSUR law.[244] The Tribunal has issued three of these opinions, two of which involved Uruguayan court queries of whether a statute imposing a "consular tax" violated MERCOSUR norms. The Tribunal held in both cases that it could not respond to the query until the appropriate Uruguayan authority decided whether the statute

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express consent of all the other member states. Laudo 1/2012 (Paraguay v. Argentina, Brazil and Uruguay) *Laudo del tribunal permanente de revisión en el procedimiento excepcional de urgencia solicitado por la República del Paraguay en relación con la suspensión de su participación en los órganos del mercado común del sur (MERCOSUR) y a la incorporación de Venezuela como miembro pleno*. [*Emergency exceptional procedure requested by the Republic of Paraguay in connection with the suspension of its participation in the organs of MERCOSUR and the incorporation of Venezuela as a full member*] at Decisión, ¶ 3, July 21, 2012, *available at* http://www.mercosur.int/innovaportal/file/375/1/laudo_01_2012_es.pdf.

240. Laudo 1/ 2005 (Uruguay v. Argentina) *Prohibición de Importación de Neumáticos Remoldeados procedentes de Uruguay* [*Import Prohibition of Remolded Tires from Uruguay*], at ¶ 26, Dec. 20, 2005, *available at* http://www.mercosur.int/innovaportal/file/DECISIÓN%20DEL%20TRIBUNAL.tif?contentid=375&version=1&filename=DECISIÓN%20DEL%20TRIBUNAL.tif.

241. Laudo 1/2006 *Supplemental Award* (Uruguay v. Argentina), *Prohibición de Importación de Neumáticos Remoldeados procedentes de Uruguay* [*Import Prohibition of Remolded Tires from Uruguay*], Jan. 13, 2006, *available at* http://www.mercosur.int/innovaportal/file/RESPUESTA%20DEL%20TPR%20AL%20RECURSO%20DE%20ACLARATORIA.tif?contentid=375&version=1&filename=RESPUESTA%20DEL%20TPR%20AL%20RECURSO%20DE%20ACLARATORIA.tif.

242. Laudo 1/2007 (Uruguay v. Argentina) *Prohibición de Importación de Neumáticos Remoldeados procedentes de Uruguay* [*Import Prohibition of Remolded Tires from Uruguay*], June 8, 2007, *available at* http://www.mercosur.int/innovaportal/file/Laudo%20N%C2%BA%201%20-07.pdf?contentid=375&version=1&filename=Laudo%20N%BA%201%20-07.pdf (ruling that the measures imposed on Argentina were not excessive).

243. Laudo 1/2008 (Uruguay v. Argentina) *Divergencia sobre el cumplimiento del Laudo N° 1/05, iniciada por la República Oriental del Uruguay (Art. 30 Protocolo de Olivos)* [*Divergence on the implementation of the Award N ° 1/05, initiated by the Oriental Republic of Uruguay (Article 30 Olivos Protocol)*], Apr. 25, 2008, *available at* http://www.mercosur.int/innovaportal/file/Laudo%201-2008.pdf?contentid=375&version=1&filename=Laudo%201-2008.pdf (ruling that Argentina's amendment to the statute failed to satisfy the requirements of the original award and again ordering Argentine to comply).

244. Olivos, *supra* note 14, art. 3.

imposed a tariff or a tax.[245] In the third Consultative Opinion, a Paraguayan court asked whether The Santa Marta Protocol on Consumer Affairs superseded certain Paraguayan legislation. The Tribunal held that it did not, since the Santa Marta Protocol had not been ratified by any member state, and, therefore, was not in force.[246]

Clearly, the evidence shows three things. First, the MERCOSUR dispute resolution system, unlike that of the Andean Community, has not been used with any frequency.[247] Second, when the system is used, both the ad hoc arbitration tribunals and the Permanent Revision Tribunal are reluctant to impose sanctions when they find violations of MERCOSUR norms. Third, as the Permanent Revision Tribunal cases show, when sanctions are imposed on a member state, they are ignored, and it does not appear that any sanction imposed by the Tribunal can be effectively enforced.

For all of these reasons, it is clear that MERCOSUR's dispute resolution system remains ineffective and inadequate and presents an obstacle to MERCOSUR's development and growth. As noted above, without an effective dispute resolution system, a MERCOSUR member state would have little incentive to comply with community norms, substantially weakening their effectiveness.[248] This remains a major problem for MERCOSUR.

245. Opinión Consultiva 1/ 2008 (Request of Uruguay re: Sucesión Carlos Schnek v. Ministry of Economics and Finances), Apr. 24, 2009, *available at* http://www.mercosur.int/innovaportal/file/OC_Nro1-2008.pdf?contentid=377&version=1&filename=OC_Nro1-2008.pdf; Opinión Consultiva 1/ 2009 (Request of Uruguay re: Frigorífico Centenario v. Ministry of Economics and Finances), June 15, 2009, *available at* http://www.mercosur.int/innovaportal/file/OPINION_CONSULTIVA_01-09.pdf?contentid=377&version=1&filename=OPINION_CONSULTIVA_01-09.pdf. Contrast this opinion with the European Court of Justice's decision in Case 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen, 1963 E.C.R. 1., a consultative opinion where the Court held that a tariff reclassification constituted a tariff increase (which violated Community norms) and that the sections of the EC Treaty in question created rights that could be directly enforced by individuals in national courts. Quite a difference! In *Van Gend en Loos,* the ECJ answered the Dutch court's question and created an important principle of community law. In these two cases, the Tribunal essentially told the Uruguayan courts to answer their own question.

246. Opinión Consultiva 1/ 2007 (Request of Paraguay re: Norte, SA v. Laoratirios Northia SA), Apr. 3, 2007, *available at* http://www.mercosur.int/innovaportal/file/PrimeraOpinionConsultiva-Versionfinal.pdf?contentid=377&version=1&filename=PrimeraOpinionConsultiva-Versionfinal.pdf.

247. *See* Helfer et al., *supra* note 235, at 2 (explaining that the 1400+ rulings of the Andean Tribunal of Justice makes it the third most active international court behind the European Court of Human Rights and the European Court of Justice).

248. *See* Porrata-Doria, Jr., *supra* note 1, at 23–24, 64.

VIII. VENEZUELA JOINS THE CLUB

A. History

After leaving the Andean Community,[249] Venezuela signed a formal Adhesion Protocol to join MERCOSUR as a full member in July 2006.[250] Why did Venezuela want to join MERCOSUR, and why did MERCOSUR's member states want it to join? Several different answers to these questions have been given. For Venezuela, the case was simple: by joining MERCOSUR, it could substantially expand its influence in Latin America. It was a strategic political move.[251]

For the MERCOSUR member states, the answer is more complex. First, for some, especially Argentina, whose trade expansion policy depends on an expansion of the MERCOSUR market,[252] the addition of Venezuela would strengthen the institution politically and economically.[253] Second, Venezuelan membership would give the MERCOSUR member states access to the largest oil and gas reserves in Latin America[254] and give Brazil access to a large new market.[255] Finally, others noted that admitting Venezuela to MERCOSUR would help neutralize Venezuela's social radicalism and anti-neoliberal economic policies. In other words, joining MERCOSUR would turn Venezuela less radical.[256] Whatever the reason, Venezuela was to be brought in to MERCOSUR.

Venezuela's formal admission was delayed, however, by failure of the Brazilian and Paraguayan legislatures to ratify the Adhesion Protocol granting it full membership.[257] The Brazilian legislature finally ratified the Protocol in March 2010,[258] while the Paraguayan legislature strongly opposed Venezuelan

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249. Brown, *supra* note 156, at 86.

250. *Protocolo de Adhesión de la República Bolivariana de Venezuela al MERCOSUR* [*Protocol of Accession of the Republic of Venezuela to MERCOSUR*], July 4, 2006, *available at* http://www.mercosur.int/innovaportal/file/2485/1/2006_PROTOCOLO_ES_AdhesionVenezuela.pdf.

251. González Urrutia, *supra* note 150, at 7–10.

252. *See* Porrata-Doria Jr., *supra* note 1, at 39–48.

253. *See* González Urrutia, *supra* note 150, at 15–18.

254. *Id*. at 18. Indeed, in recent public pronouncements, Brazil has stressed that Venezuela's admission to MERCOSUR gives its members access to one of the world's largest oil reserves. *See Brazil as Advocate*, *supra* note 147; *Venezuela Joins MERCOSUR Trading Block*, BBC NEWS (July 31, 2012), http://www.bbc.co.uk/news/world-latin-america-19069591.

255. On or about the time of its incorporation to MERCOSUR, Venezuela signed an agreement to buy as many as twenty passenger jets from Embraer, the Brazilian aircraft manufacturer, in a transaction worth $900 million. *Brazil as Advocate*, *supra* note 147.

256. *See* Larry Rohter, *Venezuela Wants Trade Group to Embrace Anti-Imperialism*, N.Y. TIMES (Jan. 19, 2007), http://www.nytimes.com/2007/01/19/world/americas/19latin.html?_r=0.

257. Brown, *supra* note 156, at 91.

258. *Venezuela Politics: Big Step Closer to Mercosur,* THE ECONOMIST INTELLIGENCE UNIT (Dec. 16, 2009), http://viewswire.eiu.com/index.asp?layout=VWArticleVW3&article_id=1305079915&region_id=440000444&channel_id=210004021&category_id=500004050&refm=vwCat&page_title=Article.

membership[259] and did not ratify the Protocol.[260] It appeared that Venezuela would never be formally admitted to MERCOSUR.

This situation changed drastically in July of 2012, apparently at the behest of Brazil.[261] In an emergency summit, the presidents of MERCOSUR, citing concern for Paraguay's democratic institutions after the Paraguayan legislature's impeachment of President Fernando Lago, suspended Paraguay from membership in MERCOSUR for six months.[262] At the same summit, since Paraguay was now suspended from membership and all other member states had deposited instruments of ratification, the MERCOSUR presidents approved Venezuela's entry as a full member, effective July 31, 2012.[263]

Now that Venezuela has formally become a member of MERCOSUR, a number of issues that have been simmering since Venezuela's application to join will come to a boil and must be addressed.

B. Changing the Game

The Treaty of Asunción, and MERCOSUR itself, has been based on an ideology of open markets and free trade.[264] All of its current full and associate members have never challenged this ideological basis.

Venezuelan former president Hugo Chavez's concept of integration is very different from, and incompatible with, the notion that integration is primarily about

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259. *Chavez's Venezuela Has No Chance of Joining Mercosur Says Paraguay Congress*, MERCOPRESS (Aug. 26, 2011), http://en.mercopress.com/2011/08/26/chavez-venezuela-has-no-chance-of-joining-mercosur-says-paraguay-congress; *Not Even Dressed as Father Christmas Will Chavez Make It to MERCOSUR,* MERCOPRESS (Mar. 22, 2011), http://en.mercopress.com/2011/03/22/not-even-dressed-as-father-christmas-will-chavez-make-it-to-mercosur.

260. Indeed, the Paraguayan government had withdrawn the ratification of the Protocol from legislative consideration. *Paraguay Retira del Congreso Protocolo de Adhesión de Venezuela al MERCOSUR* [*Paraguay Congress Recalls the Protocol of Accession of Venezuela to MERCOSUR*], AMERICAN ECONOMIA (Sept. 12, 2010), http://www.americaeconomia.com/politica-sociedad-politica/paraguay-retira-del-congreso-protocolo-de-adhesion-de-venezuela-al-mercos.

261. *See Brazil as Advocate*, *supra* note 147 (explaining Brazil's influence and exercise of power to admit Venezuela into MERCOSUR).

262. *Mercosur Suspends Paraguay over Lugo Impeachment*, BBC NEWS (June 29, 2012), http://www.bbc.co.uk/news/world-latin-america-18636201; *Mercosur Suspends Paraguay, Accepts Venezuela as New Member*, RIA NOVOSTI (June 30, 2012), http://en.rian.ru/world/20120630/174320977.html; *Brazil as Advocate*, *supra* note 147.

263. *Mercosur Suspends Paraguay over Lugo Impeachment*, *supra* note 262; *Mercosur Suspends Paraguay, Accepts Venezuela as New Member*, *supra* note 262; *Brazil as Advocate*, *supra* note 147. The reaction in Paraguay to Venezuela's admission to MERCOSUR was prompt and negative. Indeed, a suggestion was made that Paraguay should leave MERCOSUR. *See, e.g.*, *Industriales Proponen referendum para salir del MERCOSUR* [*The Industrial Union of Paraguay Proposes Referendum to Leave MERCOSUR*], EL OBSERVADOR (June 29, 2012), http://www.elobservador.com/uy/noticia/227132/industriales-proponen-referendum-para-salir-del-mercosur.

264. *See* Porrata-Doria, Jr., *supra* note 1, at 12, 26, 45; Rohter, *supra* note 256.

open markets and free trade. His vision was based on decontaminating MERCOSUR from liberalism and free trade.[265] This means focusing on political, rather than economic integration;[266] viewing the state, rather than the private sector, as the principal engine of development and the primary actor in society;[267] viewing the end result of integration as the creation of a mega-state constructed under political unity, solidarity, and economic complementation;[268] and creating a MERCOSUR army as a primary goal of the organization. In short, Chavez wanted to eliminate the current MERCOSUR template and reformulate it, under Venezuelan leadership, in accordance with his notion of "21st Century socialism."

His public statements made clear that the implementation of this program would be his priority. This would be problematic. First, other member states have a substantial amount of concern about Venezuela's "democratic deficit" and highly authoritarian system.[269] This concern is likely to block any attempt by Venezuela to push through a major change in the MERCOSUR agenda over the other member states' objections.

Second, Venezuela is likely to be a very powerful member state because of its size, its highly industrialized economy, and a GDP close to that of Argentina and Brazil.[270] Additionally, it has the second largest export sector in MERCOSUR[271] and the largest oil and gas reserves in Latin America.[272] This gives Venezuela power to affect the MERCOSUR agenda and makes it a rival to both Argentina and Brazil.[273] As discussed above, Brazil's vision of trade and economic development is very different from that of Venezuela.[274] It is not likely to support such a drastic change in the basic MERCOSUR agenda, as enshrined in the Treaty of Asunción. Argentina, whose economic and development policies have tended to be more state oriented,[275] and whose President, Cristina Kirchner, is sympathetic to President Chavez,[276] may be more receptive to Venezuela's views. A Venezuelan

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265. Nikolas Kozloff, *Divide and Rule: Driving a Wedge Between Brazil and Venezuela*, VENEZUELA ANALYSIS (Apr. 4, 2008), http://www.venezuelanalysis.com/analysis/3325.

266. *See* González Urrutia, *supra* note 150, at 4–5.

267. *Id.* at 11.

268. *Id.*

269. *Id.* at 19–20; Rohter, *supra* note 256.

270. *The World Fact Book*, CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/ve.html (last visited Feb. 20, 2013).

271. *See The World Fact Book*, CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/rankorder/2078rank.html?countryName=Venezuela&countryCode=ve&regionCode=soa&rank=42#ve (last visited February 18, 2013) (ranking the total value of Venezuela's annual exports as the forty-second largest in the world and second largest among MERCOSUR countries behind Brazil, which was ranked at twenty-four).

272. González Urrutia, *supra* note 150, at 18.

273. *See* Brown, *supra* note 156, at 90.

274. Kozloff, *supra* note 265.

275. *Id.*

276. Jeremy Morgan, *Venezuela Expropriations: Chavez Talks Himself Into Trouble with Argentina's Fernandez de Kirchner*, LATIN AMERICAN HERALD TRIB.,

attempt to remake the MERCOSUR agenda to its liking would, in all probability, be objected to by Brazil, creating a confrontation in which Argentina's positions on particular issues may determine the outcome of the dispute. Therefore, the system where the MERCOSUR integration agenda is managed and set by the consensus of the presidents of Brazil and Argentina[277] will in all likelihood come to an end. In the absence of strong community institutions serving as a counterweight to presidential power, it is likely that the MERCOSUR integration process may slow down considerably, since there will be no actor with the power to supplant the presidents.

The third problem is that Venezuela's admission as a full member is likely to further exacerbate MERCOSUR's asymmetries. The economies of Paraguay and Uruguay, the community's smaller members, will still lag considerably behind those of the larger states, qualitatively and quantitatively.[278] There will likely be a perception of a continued asymmetry in power, given the differences in size, wealth, and power between MERCOSUR's larger and smaller members.

Both Paraguay and Uruguay have been critical of Venezuela's admission to MERCOSUR.[279] Additionally, Venezuela's enthusiastic support for the admission of Bolivia as another full member, with special trade preferences and exemptions not given to Paraguay and Uruguay,[280] will in all likelihood generate further resentment. Moreover, Paraguay's resentment of its suspension over President Lago's impeachment, and the admission of Venezuela over its objection, is also likely to be a source of discord.

The potential scenario described above changed radically over several weeks and became much more uncertain. President Chavez was subjected to emergency cancer surgery in Havana on December 11, 2012. Although his medical condition was a closely guarded secret, President Chavez was apparently very ill, remained hospitalized, and was not able to be sworn in to a new term of office on January 10, 2013, as required by the Venezuelan constitution.[281] Chavez ultimately passed away in March, 2013.

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http://www.laht.com/article.asp?CategoryId=10717&ArticleId=336017 (last visited Feb. 19, 2013).

277. *See supra* notes 137–41 and accompanying text (explaining Argentina and Brazil's roles in creating MERCOSUR, leading it, and setting its agenda).

278. *See supra* notes 108–28, 169 and accompanying text.

279. MERCOPRESS, *supra* note 259; AMERICAN ECONOMIA, *supra* note 260; Rohter, *supra* note 256.

280. *See* Brown, *supra* note 156, at 90–91.

281. *See* William Neuman, *Officials Push to Postpone Swearing-In of Chávez*, N.Y. TIMES (Dec. 24, 2012), http://www.nytimes.com/2012/12/25/world/americas/hugo-chavez-aides-want-to-postpone-swearing-in.html; William Neuman, *Venezuela: After Surgery, Chávez is Fighting a Severe Infection*, N.Y. TIMES (Jan. 3, 2013), http://www.nytimes.com/2013/01/04/world/americas/after-surgery-chavez-is-fighting-a-severe-lung-infection.html; Francisco Toro, *The Schrodinger President*, N.Y. TIMES BLOGS (Jan. 3, 2013, 5:52 AM), http://latitude.blogs.nytimes.com/2013/01/03/still-more-secrecy-surrounds-chavezs-physical-condition/.

The Venezuelan constitution requires that a new election be held. The results of the election are uncertain, since no leader in President Chavez's political movement (the PSUV) holds unquestioned authority, and different ideological factions (ranging from extreme to moderate socialists) within the movement would be competing against each other. A radical PSUV president might wish to continue with Chavez's plans for MERCOSUR, while a moderate PSUV might abandon or postpone them. It is also possible that the political opposition might win, in which case the Chavez agenda for MERCOSUR would probably be quickly abandoned.[282]

C. Resolving the Clash of Ideologies

Assuming that Venezuela would make an attempt to completely refashion the MERCOSUR template to conform to its notions of "21st Century socialism," there are three possible outcomes.

First, the attempt might succeed and MERCOSUR will be transformed into a state-oriented, "policy and development" organization, rather than a free trade block. This scenario is unlikely to happen, since Brazil is still firmly committed to free trade, and it is by far the largest and most powerful member of MERCOSUR.[283] If, for some reason, Brazil is convinced not to object to the transformation, then it is unlikely that it will leave MERCOSUR, since it needs to remain in order to retain its hegemonic role in the region.[284] What is more likely is that Brazil would keep its participation in MERCOSUR at a minimum and would instead concentrate on establishing itself as a global economic power.[285]

Paraguay, given its previous opposition to Venezuela's entry into MERCOSUR and its resentment over its suspension, may leave the community altogether, unless MERCOSUR can find something—increased economic infrastructure or substantial additional trade preferences—that may convince Paraguay that it would gain more by staying in MERCOSUR than by leaving it. Uruguay will have to make a similar calculation. For Uruguay, the primary attraction of MERCOSUR has been free access to the markets of Brazil and Argentina. If MERCOSUR stops providing these, then it makes more sense to

282. *See Brotherly Love in the Bolivarian Republic: With the President Ill, Who is Really Running the Country?*, THE ECONOMIST (Jan. 12, 2013), http://www.economist.com/news/americas/21569394-president-ill-who-really-running-country-brotherly-love-bolivarian; *Venezuela in Limbo: Since Hugo Chávez is too Ill to be Inaugurated, Someone Else Should Take Over*, THE ECONOMIST (Jan. 12, 2013), http://www.economist.com/news/leaders/21569420-hugo-ch%C3%A1vez-too-ill-be-inaugurated-somebody-else-should-take-over-limbo; Masa Serdarevic, *What Would a Post-Chávez Venezuela Look Like?*, FIN. TIMES (Jan. 15, 2013), http:/ftalphaville.ft.com/2013/01/15/1337232/what-would-a-post-chavez-venezuela-look-like.

283. *See* Kozloff, *supra* note 265; *see also* Brown, *supra* note 156, at 90 (citing complaints of Uruguay and Paraguay regarding Brazil and Argentina pushing regional trade policies that benefit their own larger domestic markets).

284. *See* Brown, *supra* note 156, at 90 (explaining how Brazil used its position of control in MERCOSUR to benefit its proportionally large economy).

285. *Id.*

leave and seek trade relationships with other countries such as the United States.

The second possible scenario is that Venezuela fails in its attempt to remake MERCOSUR and the organization retains its free trade, neoliberal orientation. This is also unlikely to happen, as Brazil remains the only member state still committed to the neoliberal, free trade oriented economic model.[286] It could still happen if Brazil, as the regional hegemon, exerts all its power to ensure that MERCOSUR reaches this outcome. If that happens, depending on whether a radical or moderate PSUV president were in office, then Venezuela would simply leave MERCOSUR, as it did with the Andean Community.[287]

The third possible outcome is a partial victory and MERCOSUR, while retaining its free trade/free market orientation, would increase its activities on social and political issues. This is the most likely scenario, since this emphasis on non-economic issues is already taking place within MERCOSUR.[288] Under this scenario, assuming that MERCOSUR can achieve a consensus on what political, developmental, and social issues are to be given priority and how they are to be implemented, MERCOSUR and its institutions would dedicate more of its time, efforts, and funds to these issues, without abandoning its common market ethos. MERCOSUR would, in essence, become a hybrid political/economic development/free trade organization. The MERCOSUR consensus would still change but in a much more gradual fashion.[289]

This scenario has some difficulties. First, agreeing on what issues will be given priority, and how they will be implemented, may be hard to achieve, since some of these issues may be controversial among the member states. Second, some of the social, political, and developmental problems facing the MERCOSUR member states may be simply beyond MERCOSUR's ability to fix. As was the case with LAFTA, there may always be increasingly more problems to resolve and requests for assistance than MERCOSUR may be able to handle.[290] MERCOSUR's failure to resolve these prioritized problems could detract from its credibility as an effective institution.

Third, since MERCOSUR does not have an extensive institutional framework or unlimited resources, it is going to need to prioritize its programmatic initiatives. Some member states, like Brazil, will still be primarily interested in trade and market issues, and others, like Venezuela, would be primarily interested in particular ideological solutions to political and social problems. Addressing these priorities is going to require substantial negotiations among the member states,

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286. *See id*. at 92 (explaining the ongoing US-Brazil relationship in comparison to the more resistant left-wing governments of the other MERCOSUR countries).

287. *Id.* at 86.

288. *Id*. at 89–90.

289. President Chavez may not be content with this solution, given his strong statements about "decontaminating" MERCOSUR. *See supra* note 241 and accompanying text. If he does not get all he wants, he may simply leave, or try to obstruct any MERCOSUR initiatives that do not fit his preferences.

290. PORRATA-DORIA, JR., *supra* note 180, at 10–12.

which have vastly different preferences and priorities. The system of presidential management that has been the primary promoter of the MERCOSUR integration agenda is breaking down.[291] In the absence of a strong, independent, transnational "guardian of the community," such as the European Commission,[292] there exists no natural and neutral mediator for these negotiations. The risk, then, is that consensus on these issues may not be forthcoming and not much will get done in furthering the MERCOSUR agenda.

IX. CONCLUSION

This Author concluded in 2003–2004 that MERCOSUR needed to deal with two major problems to achieve its goals: its lack of effective supranational institutions and its lack of an effective dispute resolution mechanism. The evidence analyzed and discussed here shows that MERCOSUR has failed to resolve these two problems successfully in the last eight years.

MERCOSUR's lack of effective supranational institutions essentially creates a situation which requires the consensus of all of the member states for any policy to be agreed upon and implemented.[293] Its recent attempts at supranational institution building—PARLASUR and COREPER—have not yet been successful. Both of these institutions have little real power, responsibility, or influence and are essentially not functioning at this time. As discussed above, PARLASUR seems to be in a state of suspended animation, with no popularly elected members, as required by its constituent Protocol, no alternative selection mechanism, and no active members since its only elected member is currently suspended.[294] COREPER at this point seems to be essentially inactive.[295] MERCOSUR's other current institutions remain unchanged.

The power vacuum created by MERCOSUR's institutional deficit has resulted in the creation and use of an alternate mechanism to devise and carry out its integration agenda. This mechanism has been the informal diplomacy among the Presidents of the MERCOSUR member states, especially those of Argentina and Brazil. This alternate decision making/policy setting/dispute resolution mechanism is no longer as effective as it used to be, and with the addition of Venezuela as a full member of MERCOSUR, it is in danger of breaking down.[296]

The solution to this problem is simple: to be able to function effectively, MERCOSUR needs to substantially reform, strengthen, and upgrade its institutions and institutional structure to set, manage, and implement its integration agenda.

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291. *See supra* notes 129–53 and accompanying text.

292. *See* Porrata-Doria Jr., *supra* note 1, at 71–72.

293. Indeed, most MERCOSUR norms are not effective until *all* of the member states have ratified them and made them part of their national legal system. *See Protocol of Ouro Preto*, *supra* note 184, arts. 38–40.

294. *See supra* notes 219–22 and accompanying text.

295. *See supra* note 230 and accompanying text.

296. *See supra* notes 142–53 and accompanying text (explaining that MERCOSUR success is attributable to its members sharing a common goal and Venezuela's membership introduces a divergent goal, which is problematic).

The changed economic circumstances over the last few years have accentuated the economic asymmetries between MERCOSUR's larger and wealthier members, Argentina and Brazil, and its smaller and poorer ones, Paraguay and Uruguay. These increased asymmetries have resulted in great dissatisfaction by these latter countries, which complain that they are not benefiting from MERCOSUR's increased free trade and deregulation. Paraguay and Uruguay argue that they will always remain poor and underdeveloped because of their inferior economic infrastructure. FOCEM, created in 2004 chiefly to help Paraguay and Uruguay improve their infrastructures, has been helpful, but the extent of their need is so great that substantially more infrastructure investment is needed. If this issue is not adequately addressed, then Paraguay and Uruguay may conclude that they have less to gain by remaining in MERCOSUR than by leaving and seeking other trade alliances.

Paraguay's recent suspension from MERCOSUR has not made things better. Indeed, tempers in Paraguay are so incensed by this action that there is talk of Paraguay leaving MERCOSUR.[297] This suspension—and the Permanent Arbitration Tribunal's unwillingness to review it expeditiously[298]—sends a message that plenary power in MERCOSUR resides in, and is exercised by, its larger members: Argentina, Brazil, and Venezuela. Additionally, the smaller members, or potential members, have little or no recourse against an abuse of this power. For a small country considering entry into MERCOSUR, such a loss of control might outweigh the benefits of increased trade. Even if Paraguay returns to MERCOSUR after its suspension, then the resentments created by the suspension may create additional tensions and problems.

Our empirical examination of the output of the MERCOSUR dispute resolution institutions created by the Olivos Protocol, the Permanent Revision Tribunal, and the ad hoc arbitration courts, shows the MERCOSUR dispute resolutions system is not effective. Both institutions have been reluctant to find violations of MERCOSUR norms or to impose sanctions on the few occasions when they have been used. Lastly, when sanctions have been imposed on a member state, they have been ignored. It does not appear that any MERCOSUR-imposed dispute resolution sanction has been, or can be, effectively imposed.

Lastly, Venezuela's admission as a full Member of MERCOSUR might create a substantial paradigm shift, with the possibility that the consensual institutional paradigm under which it has been operating may be changed. In that case, MERCOSUR has to decide what it wants to be: a free trade/common market organization, a state oriented political and social policy/economic development organization, or a combination of the two. Each of these pathways will have consequences that must be addressed.

MERCOSUR is at a crossroads. In order to thrive and prosper, it must reach a new consensus on its mission and purpose. It must also create an institutional

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297. *See supra* notes 262–63 and accompanying text.

298. *See supra* notes 236–48 and accompanying text.

framework that allows it to achieve these goals in an efficient and effective manner. Such a framework requires the creation of efficient and powerful supranational institutions to set and implement policies and an effective dispute resolution mechanism that will encourage compliance with MERCOSUR norms.